# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statutes involved | 4 |
| Statement | 4 |
| Specification of errors to be urged | 14 |
| Summary of argument | 16 |
| Argument | 28 |
| I. Respondent is not entitled to compensation with respect to any water-power value of the property condemned | 27 |
| II. Even if compensation for water-power value were otherwise proper, the award herein is erroneous to the extent that it includes compensation for water-power value | 42 |
| A. The estimates of value based on the capitalization of predicted future profits from the hypothetical development should not have been considered and, in any event, do not support the award | 43 |
| 1. Such evidence is incompetent | 43 |
| 2. In any event the predicted profits could not have been realized | 47 |
| a. The cost of constructing the four-dam project | 48 |
| b. The annual fixed charges | 52 |
| c. The amount of power available for sale | 57 |
| d. The total cost of the power | 60 |
| e. The price at which the assumed output could be sold | 60 |
| B. Respondent's land in fact had no water-power value, because there was no reasonable probability that it would be commercially developed for power purposes within the reasonably near future | 67 |
| III. There is no legally sufficient evidence to support the award | 82 |
| A. Respondent's true investment was $277,821.56, the actual cost of the property condemned, rather than the artificial amount of about $1,000,000 relied upon by both courts below which included a wide variety of promoter's expenditures wholly unrelated to the value of the property | 83 |
| B. The courts below erroneously relied upon prices allegedly paid by the Government for other lands needed for the same project | 84 |
| IV. The maximum market value of the land at the date of taking was $165,000 | 88 |




441619—42—

Page

V. The award of severance damages was erroneous ..... 90
VI. The award of interest was excessive ..... 100
VII. The unusual scope of appellate review under Section 25 of the Tennessee Valley Authority Act ..... 103
Conclusion ..... 105
Appendix ..... 106

## CITATIONS

Cases:

*Bensel, In re*, 230 Fed. 932 ..... 46, 77, 81
*Boom Co. v. Patterson*, 98 U. S. 403 ..... 70
*Bothwell v. United States*, 254 U. S. 231 ..... 80
*Brett v. United States*, 86 F. (2d) 305 ..... 70
*Burt v. Wigglesworth*, 117 Mass. 302 ..... 46
*Cameron v. Chicago, M. & St. P. Ry.*, 42 Minn. 75 ..... 93, 98
*Campbell v. United States*, 266 U. S. 368 ..... 96
*Carolina-Tennessee P. Co. v. Hiawassee River P. Co.*, 188 N. C. 128 ..... 78
*Central Georgia Power Co. v. Stone*, 139 Ga. 416 ..... 90
*City of Los Angeles v. Deacon*, 119 Cal. App. 491 ..... 46
*City of Stockton v. Vote*, 76 Cal. App. 369 ..... 45
*Consumers Power Co.*, 6 S. E. C. 444 ..... 55
*Continental Land Co. v. United States*, 88 F. (2d) 104, certiorari denied, 302 U. S. 715 ..... 38, 69, 81
*Duggan v. State*, 214 Iowa 230 ..... 99
*East Bay Municipal Utility Dist. v. Kieffer*, 99 Cal. App. 240, rehearing denied, 99 Cal. App. 260 ..... 45, 93, 99
*Eichelberger v. Arlington Building, Inc.*, 280 Fed. 997 ..... 100
*Engineers Public Service Co.* (El Paso Electric Co.), Holding Company Act Release No. 2535, Feb. 4, 1941 ..... 55
*Essex Storage Elec. Co. v. Victory Lumber Co.*, 93 Vt. 437 ..... 93
*Finley v. United States*, 118 F. (2d) 815 ..... 105
*Five Tracts of Land v. United States*, 101 Fed. 661 ..... 80, 81
*Gilmore v. Central Maine Power Co.*, 127 Me. 522 ..... 70
*Glendenning v. Stahley*, 173 Ind. 674 ..... 99
*Greenfield v. Philadelphia*, 282 Pa. 344 ..... 46
*Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146 ..... 34
*Hamilton v. Pittsburg, B. & L. E. R. Co.*, 190 Pa. St. 51 ..... 46
*Higgins v. Smith*, 308 U. S. 473 ..... 100
*Jacob Ruppert v. Caffey*, 251 U. S. 264 ..... 34
*Joslin Co. v. Providence*, 262 U. S. 668 ..... 80
*Kidd v. Pearson*, 128 U. S. 1 ..... 34
*Kohl v. United States*, 91 U. S. 367 ..... 77
*Kossler v. Pittsburg, C. C. & St. L. Ry. Co.*, 208 Pa. 50 ..... 46
*Louisville & N. R. Co. v. Western Union Tel. Co.*, 268 Fed. 44, affirmed, 258 U. S. 13 ..... 79
*Matter of City of New York (Blackwell's Island Bridge)*, 118 App. Div. 272 ..... 46
*McCandless v. United States*, 298 U. S. 342 ..... 70

Cases—Continued.


| | Page |
|---|---|
| *McGovern* v. *New York*, 229 U. S. 363 | 75, 80 |
| *Medina Valley Irr. Co.* v. *Seekatz*, 237 Fed. 805 | 75 |
| *Mitchell* v. *United States*, 267 U. S. 341 | 80, 94 |
| *Morris & Cummings Dredging Co., In re*, 97 N. J. L. 248 | 46 |
| *Morton Butler Timber Co.* v. *United States*, 91 F. (2d) 884 | 46 |
| *Mugler* v. *Kansas*, 123 U. S. 623 | 34 |
| *New York* v. *Sage*, 239 U. S. 57 | 75, 80 |
| *New York Cent. R. Co.* v. *Maloney*, 234 N. Y. 208 | 46 |
| *Niagara Falls Power Co.* v. *Water Power and Control Comm.*, 267 N. Y. 265, certiorari denied, 296 U. S. 609 | 38 |
| *North Yarmouth Water Co., In re*, P. U. R. 1915E 109 | 55 |
| *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508 | 17, 24, 35, 37 |
| *Oakland* v. *Pacific Coast Lumber & Mill Co.*, 171 Cal. 392 | 93, 94 |
| *Olson* v. *United States*, 292 U. S. 246 | 68, 80, 90 |
| *People* v. *Adirondack Ry. Co.*, 160 N. Y. 225, affirmed, 176 U. S. 335 | 79 |
| *Planters' Cotton Oil Co., Inc.* v. *Hopkins*, 53 F. (2d) 825, affirmed, 286 U. S. 332 | 100 |
| *Potts* v. *Pennsylvania & S. V. R. Co.*, 119 Pa. St. 278 | 99 |
| *Ralph* v. *Hazen*, 93 F. (2d) 68 | 88 |
| *Ramapo Water Co.* v. *New York*, 236 U. S. 579 | 79 |
| *San Diego Land & Town Co.* v. *Neale*, 88 Calif. 50 | 45, 90 |
| *Santa Fe Elec. Co., Inc.*, v. *General Elec. Co.*, 52 F. (2d) 603 | 100 |
| *Seaboard Air Line Ry.* v. *United States*, 275 Fed. 77 | 70 |
| *Sharpe* v. *United States*, 112 Fed. 893, affirmed, 191 U. S. 341 | 96, 99 |
| *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177 | 104 |
| *Shoemaker* v. *United States*, 147 U. S. 282 | 104 |
| *Simmons, In re*, 114 N. Y. Supp. 575, affirmed, 195 N. Y. 573, affirmed *sub. nom. McGovern* v. *New York*, 229 U. S. 363 | 46, 70 |
| *Sioux City & D. M. Ry. Co.* v. *Chicago, M. & St. P. Ry. Co.*, 27 Fed. 770 | 79 |
| *Sparkill Realty Corp.* v. *State*, 268 N. Y. 192 | 46 |
| *State Highway Comm.* v. *Brown*, 176 Miss. 23 | 70 |
| *Stephenson Brick Co.* v. *United States*, 110 F. (2d) 360 | 105 |
| *St. Louis, M. & S. R. R. Co.* v. *Aubuchon*, 199 Mo. 352 | 95 |
| *Stockton & C. R. Co.* v. *Galgiani*, 49 Calif. 139 | 46 |
| *Tacoma* v. *Nisqually Power Co.*, 57 Wash. 420 | 46, 76 |
| *Tillman* v. *Lewisburg & N. R. Co.*, 133 Tenn. 554 | 99 |
| *Trustees of Boston University* v. *Commonwealth*, 286 Mass. 57 | 97 |
| *United Gas Co.* v. *Railroad Comm.*, 278 U. S. 300 | 44, 45 |
| *United States ex rel. Tennessee Valley Authority* v. *Longmire*, decided August 23, 1935 | 38 |
| *United States* v. *Appalachian Power Co.*, 311 U. S. 377 | 17, 24, 29, 30, 34, 37 |
| *United States* v. *Bailey*, 115 F. (2d) 433 | 87, 105 |
| *United States* v. *Beaty*, 198 Fed. 284 | 87 |

Cases—Continued. Page

*United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53..... 17, 24, 28, 29, 30, 38, 39, 41, 42, 60
*United States* v. *Crary*, 2 F. Supp. 870..... 88
*United States* v. *Freeman*, 113 Fed. 370..... 87
*United States* v. *Grissard*, 219 U. S. 180..... 92, 96
*United States* v. *Harris*, 115 F. (2d) 343..... 105
*United States* v. *Meyer*, 113 F. (2d) 387..... 46
*United States* v. *Reynolds*, 115 F. (2d) 294..... 105
*United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690.. 17, 24, 34
*United States* v. *Utah*, 283 U. S. 64..... 34
*Welch* v. *Tennessee Valley Authority*, 108 F. (2d) 95, certiorari denied, 309 U. S. 688..... 88
*White* v. *Metropolitan West Side El. R. Co.*, 154 Ill. 620.... 94, 95
*Wiboff, Re*, 19 P. U. R. (n. s.) 173..... 55

Statutes:

Rivers and Harbors Act of 1899, c. 425, 30 Stat. 1121:
Sec. 9..... 110
Sec. 10..... 32, 111
Federal Water Power Act, c. 285, 41 Stat. 1063, as amended by the Act of August 26, 1935, c. 687, 49 Stat. 803, 838, 842, 846:
Sec. 7..... 39
Sec. 23..... 32
Act of February 26, 1931, c. 307, 46 Stat. 1421 (40 U. S. C., Sec. 258a):
Sec. 1 (5)..... 102
Tennessee Valley Authority Act of 1933, c. 32, 48 Stat. 58:
Sec. 4..... 4, 40, 102
Sec. 25..... 103, 106
Sec. 26a (as amended by the Act of August 31, 1935, c. 836, 49 Stat. 1075, 1079)..... 33, 109
Sec. 831c (h) (1) (as amended)..... 102
Public Utility Act of 1935, c. 687, 49 Stat. 803, 815..... 55
Federal Water Power Act, as amended (49 Stat. 838):
Sec. 7..... 109
Sec. 23..... 110
First Deficiency Appropriation Act, 1936, c. 689, 49 Stat. 1597, 1607..... 40
North Carolina Code of 1939, Sec. 1112 (18)..... 55

Miscellaneous:

2 Nichols, *Eminent Domain* (2d ed., 1917):
Sec. 432..... 88
Sec. 456..... 87
2 Lewis, *Eminent Domain* (3d ed., 1909):
Sec. 645..... 88
Sec. 667..... 87
Orgel, *Valuation under Eminent Domain* (1936):
Sec. 88, p. 288..... 77
P. U. R. Digest, volume 5, sec. 99..... 55
Rules of Civil Procedure, Rule 52 (a)..... 104

# In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 500

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

*v.*

W. V. N. POWELSON, ASSIGNEE AND SUCCESSOR IN INTEREST OF SOUTHERN STATES POWER COMPANY, A CORPORATION, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The report of the Commissioners (R. 768–781)[1] is unreported. The opinion of the District Court

[1] The full record in this case consists of the transcripts of the proceedings before the commissioners, the district court, and the court below, together with numerous exhibits, all of which have been certified and filed with this Court. In view of the voluminous character of the record, the parties have

(R. 1051–1067) is reported in 33 F. Supp. 519. The opinion of the Circuit Court of Appeals (R. 1072–1084) is reported in 118 F. (2d) 79.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 10, 1941 (R. 1085). Petition for rehearing was denied on May 10, 1941 (R. 1088). The petition for a writ of certiorari was filed on August 9, 1941, and was granted on October 13, 1941. The jurisdiction of this Court rests on section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

The Government condemned lands in and adjacent to the Hiwassee River, a principal tributary of the Tennessee River, for the purpose of constructing a dam in the development of an interstate system for navigation, flood control, and related purposes. The principal questions are:

1. Whether just compensation must include an allowance for water-power value when any private power development at the site would have been subject to the plenary control of the United States.

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stipulated (R. 1099) for the printing of only selected portions of the record, and those portions have been consolidated in a single volume designated herein as "R." References herein to "Comm. Tr." are to the typewritten transcript of the proceedings before the commissioners, which, as indicated above, are included in the full record before the Court.

2. Whether, even if an allowance for power value were otherwise permissible, the allowance for power value here is incorrect because:

(a) It rests at least in part upon incompetent evidence of estimates of possible future profits from an elaborate hypothetical private power development in which the property condemned would be combined with other land owned by respondent and with hundreds of other tracts of land not owned by respondent.

(b) The record shows that the property in fact had no commercial value for water-power purposes.

3. Whether, in relying upon respondent's investment in the property for the purpose of determining market value, it was proper to include large promoter's expenditures.

4. Whether evidence of prices paid by the Government for other land acquired for the same project was admissible or in fact accurately reflected the true value of respondent's land.

5. Whether severance damages should be awarded for alleged depreciation in value of (a) lands physically separated from the land taken and not unified with it in any existing use, and (b) lands not owned by respondent.

6. Whether interest was properly computed.

7. Whether, under section 25 of the Tennessee Valley Act, the appellate court should fix the value of the property upon the basis of the entire record

without regard to the awards or findings theretofore made by the commissioners or the district court.

## STATUTES INVOLVED

The relevant portions of the Tennessee Valley Authority Act of 1933, the Federal Water Power Act, and the Rivers and Harbors Act of 1899 are set out in the Appendix, *infra*, pp. 106–112.

## STATEMENT

On January 28, 1936, the United States, on behalf of the Tennessee Valley Authority, filed a petition in the United States District Court for the Western District of North Carolina, to condemn certain lands in and adjacent to the Hiwassee River, a major tributary of the Tennessee River.[2] The lands condemned now constitute a part of the site of Hiwassee Dam, a multiple-purpose project constructed by the Tennessee Valley Authority on the Hiwassee River as part of the development of the Tennessee River system for navigation, flood control, and related purposes.

[2] On the same day, January 28, 1936, the initial declaration of taking, relating to part of the lands here involved, was filed in accordance with the provisions of c. 307, 46 Stat. 1421, and sections 4 (h) and (i) of the Tennessee Valley Authority Act of 1933, c. 32, 48 Stat. 58, 60, as amended by the Act of August 31, 1935, c. 836, 49 Stat. 1075. Other declarations of taking, relating to the remaining lands here involved, were filed subsequently. The acreage taken and the money deposited with each declaration of taking are shown in footnote 54, *infra*, p. 101.

Hiwassee Dam is situated in North Carolina, approximately 77 miles above the mouth of the Hiwassee in Tennessee. The Hiwassee is continuously navigable from its mouth for a distance of 41.2 miles (R. 1098; Res. Ex. 189, p. 216). Although the Hiwassee is not navigable at the site of Hiwassee Dam or in any part of its course through respondent's land (which begins at 65 miles from the mouth of the river), the operation of any private dams that might be constructed at that site or at other sites on respondent's land thought to be suitable for the construction of dams would have a substantial effect on navigation in the lower portion of the river (R. 545–550; Res. Ex. R–8). And since the Hiwassee is located in a region of heavy rainfall, the construction of a flood-control dam at the site of Hiwassee Dam is an essential part of any plan designed to insure adequate control of floods on the Tennessee and Mississippi Rivers (R. 926; Res. Ex. 204, pp. 18–20, 96, 99). Moreover, Hiwassee Dam is also used to regulate the minimum flow of the river for navigation purposes, and, so far as consistent with flood control, for the production of power (R. 928–929, Res. Ex. 204, pp. 96, 99).

With minor exceptions the land condemned was owned by the Southern States Power Company, which has since assigned its property interest and rights arising out of these proceedings to the

respondent W. V. N. Powelson,[1] its sole stockholder. The property condemned consists of approximately 12,000 acres of land along the Hiwassee River in North Carolina, beginning at a point about 12 miles upstream from the Tennessee-North Carolina boundary and extending up the Hiwassee River about 23 miles to the town of Murphy. Only 2,000 acres have been cleared and cultivated. The remaining area is very rough and mountainous, consisting in large part of rock surface, mountain peaks, and gorges (R. 771; Res. Exs. 8, 362; Pet. Exs. T, V, 2–W). At the time these proceedings were initiated most of the land was inaccessible, and there were no improved highways on the property, although there were some cart ways (R. 771, Pet. Exs. T, V).

Respondent, or his predecessors in title, began to acquire the land as early as 1913 and continued to add to his holdings until about 1928 (R. 267, 318, 323–324; Res. Exs. 187, 363). The actual cost of the land condemned was less than $300,000 (Res. Exs. 362, 363), although respondent's total investment exceeded $1,000,000, which included such items as New York office expense, taxes, expense of organizing and dissolving eight or nine separate corporations, travelling expense, advertising, interest on bonds, and fees for engineering studies admittedly obsolete at the time

[1] For convenience, Powelson and Southern States Power Company will be referred to interchangeably as "respondent."

of the trial (R. 282, 292–296, 298–301, 304–309, 314–316; Res. Ex. 187).

Pursuant to Section 25 of the Tennessee Valley Authority Act, the District Court appointed three commissioners to take testimony and determine the value of the property. The Government contended that the property was worth only from $95,000 to $165,000 (R. 523, 534), while respondent sought to establish a value of $7,500,000 (R. 214).

Respondent's valuation was based upon the theory that the property condemned, together with other property owned by respondent, could be united with hundreds of other tracts of land owned by strangers, and that an elaborate four-dam hydroelectric project could be constructed upon all of those lands. Only one of the four hypothetical dams was to be located on the property condemned, that is, at the Hiwassee Dam site, and it was never contended that that site, if considered alone, was feasible for power development (*cf.* R. 194, 212–213). The imaginary four-dam project was to consist of dams located at each of the sites designated by respondent and identified in the record as "Murphy," "Nottely," "Powelson" (the site of Hiwassee Dam and the property condemned herein), and "Appalachia." See, *e. g.*, Res. Ex. R–8.

The proposed "Murphy" reservoir would have affected 467 individual tracts containing 32,500 acres, of which respondent owned only 9 tracts

containing 835 acres; the remaining tracts involved over 500 individual owners (R. 261, 324; Comm. Tr. 3339–3342, 3346; Res. Exs. 8, 362; Pet. Ex. U).

In the "Nottely" reservoir respondent owned no land. About 27 per cent of the acreage required was claimed by the Union Power Company, a wholly owned subsidiary. The remainder was in scattered individual ownerships (R. 34, 154, 304; Res. Ex. 8).

The "Powelson" reservoir would have affected 348 individual tracts containing approximately 19,000 acres, 5,900 acres of which were below the 1520 contour line.[4] Respondent made no claim to 189 of these tracts containing approximately 7,000 acres, 1,450 acres of which were to be flooded (Comm. Tr. 4403, 4446, 3266–3267, 4407–4408, 4482; Pet. Ex. 2–H). Thus, out of the total of approximately 19,000 acres affected by this reservoir, respondent made no claim to 38.4 per cent of the acreage and 54.3 per cent of the individual tracts. In addition, respondent's title to 68 tracts, containing a total of 4,506 acres, was admittedly defective (Pet. Ex. 3–P), and there is strong evidence that respondent's title was likewise defective as to an additional 19 tracts, containing 1,196 acres (R. 256–257; Pet. Ex. 2–U). It

[4] The 1520 contour line has significance only because it was contemplated that the land below that line would be flooded (R. 901). That land may conveniently be referred to as "basin" land.

thus appears that respondent had undisputed title to only about 32 per cent of the acreage and 21 per cent of the tracts required in connection with the "Powelson" dam.

It was admitted that the acquisition of these necessary lands and other rights required for the four-dam development could not be accomplished without resorting to the power of eminent domain, but respondent insisted that since that power had been conferred on his corporation by the State of North Carolina, the case should be viewed as if he owned every foot of land required for the projected development (R. 154, 261–263, 284, 338, 511). However, respondent could not have reached all of the property through the power of eminent domain. Some of the tracts were owned by the United States (R. 624, 758–759; Comm. Tr. 4412–4413, 4423–4424, 5245–5248), and some by the State of North Carolina (Comm. Tr. 2754–2756). Moreover, still other tracts were already devoted to public uses,[1] thereby rendering it doubtful whether they were subject to respondent's power of eminent domain.

The evidence by which respondent sought to establish the value of the property consisted of calculations as to the cost of constructing the

[1] These included the site of an existing hydroelectric plant in the Hiwassee River (R. 263–265), railroad, telephone, telegraph, and transmission-line rights of way (R. 272–274; Comm. Tr. 4411, 4422), and property used for cemeteries and school and church purposes (Comm. Tr. 1588, 4410–4411, 4421–4422).

project, together with estimates as to the amount of power that could be produced, the cost of production, and the prices at which the power could be sold (R. 200–205; Res. Exs. 282–289). From these calculations and estimates he computed an annual future profit, gave it a capitalized value by projecting it arbitrarily into the future, allocated a portion of it to the land in controversy, and arrived at a value of $7,500,000 for the property condemned (R. 209–214).

Respondent's valuation was based on the following assumptions: a construction cost of $30,000,000 for the four-dam project (R. 236–237; Res. Ex. 282); an annual output of 512,500,000 kwh of so-called reserve, or superprimary, or "Saluda-type" energy (R. 201–202);* a production cost of electricity of 3.75 mills per kwh (R. 212–213); and a selling price of 6.34 mills per kwh for all the energy produced (R. 203). Respondent introduced no evidence as to the market value of the property but relied solely on the foregoing computations.

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*Respondent's theory was that the reservoirs would store water during the wet season and that the power would be sold to neighboring utility companies during the dry season to firm up their secondary hydroelectric power. This type of power was referred to as "superprimary" or "Saluda-type" power (R. 85, 103–104). The name was derived from the fact that the Lexington Water Power Company sold the output of its Saluda plant to the Duke Power Company in 1927 on a similar basis (R. 121–122).

The Government objected to the introduction of this evidence as incompetent (R. 802, 1047).

The Government introduced evidence showing that the land had a maximum market value of $165,000 (Comm. Tr. 3093, 3204, 3215, 3225, 3248). And, upon the assumption that respondent's extensive evidence with respect to the imaginary project was competent, the Government introduced rebuttal testimony of eminent engineers, who testified that the possibility of future private development was so remote that it could not enhance the market value of the land. The witnesses stated that the project envisioned by respondent could not be developed profitably in the circumstances existing at the date of the taking or in any circumstances likely to exist in the reasonably near future (Comm. Tr. 4063–4064, 4821, 4953–4954, 5166–5167). They estimated that the cost of constructing the proposed project would be approximately $42,000,000 to $51,000,000 instead of $30,000,000 (R. 698, 589, 709, 689); that the project would produce from 425,000,000 to 442,000,000 kwh instead of 512,500,000 kwh (R. 708, 682, 698); that the cost of money, depreciation, and taxes would be much greater than testified to by respondent (R. 664, 643, 847, 862–863, 927, 993; Pet. Ex. 2–Y; Res. Ex. 282); that the cost of production of electricity would be a minimum of 9.5 mills instead of 3.75

mills per kwh (R. 934–935); and that the reasonable market value of the electricity would be about 3 mills instead of 6.34 mills[7] (R. 854, 868, 960).

At the insistence of the commissioners and over the objection of the Government evidence was introduced as to the prices paid for other lands required for the Hiwassee project (R. 537–540, 636–640). That evidence showed that $396,894.79 had been expended to purchase 9,500 acres of the land required; of this acreage, 1,229 acres were situated below and the remaining 8,271 acres above the 1520 contour line[8] (Pet. Ex. 3–N). The land thus acquired included urban property and tracts used for churches, schools, and mills[9] (R. 898, 904–905). Although the price of $396,894.79 paid for 9,500 acres of such land represents an average of approximately $41 an acre, the average price paid for land similar to that of respondent was $27.70 an acre (R. 909).

The commissioners found that the land condemned had a value of $1,437,000, and, on the theory that respondent was also deprived of the

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[7] The Government's evidence as to the price at which the power might be sold was based on the prices actually paid for power in this section of the country and upon the alternative cost of producing power by steam plants (R. 854, 868, 960).

[8] See footnote 4, *supra*, p. 8.

[9] To obtain still further lands necessary for the project, including an operating talc mine, the Government paid an additional $158,636.00 (R. 1077).

use of his remaining land as the site for an integrated hydroelectric system, they awarded $253,000 in addition as "severance damages," although the remaining land was not contiguous to the land condemned and there was no existing unity of use (R. 775, 780–781).

Both parties sought review of the awards before the three-judge District Court under Section 25 of the Tennessee Valley Authority Act. The district court fixed the value of the land condemned at $976,289.40—a figure which it reached by placing a value of $200 an acre on the land to be flooded, on the theory that "power value" attached to such land only, and a value of $10 an acre, which it found to be the ordinary market value, on all other land (R. 1058). Severance damages to respondent's remaining land were placed at $111,791.23 (R. 1060), and severance damages resulting from the taking of the Murphy hydroelectric plant were fixed at $100,000 (R. 1062). To each of these amounts the court added interest at 6 per cent from January 28, 1936, calculated on the assumption that the value of *all* of respondent's land for water-power purposes was destroyed with the filing of the initial declaration of taking (R. 1062–1065).

On appeal from the District Court's decision, the court below at the outset rejected the Government's contention that under section 25 of the Tennessee Valley Authority Act, it must exercise its inde-

pendent judgment and fix the value of the land without regard to the awards or findings previously made (R. 1073–1074). It also held that respondent was entitled to have the property valued on the basis of its potential use as a part of a proposed hydroelectric development and, with two modifications,[10] affirmed the judgment of the district court.

## SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that respondent was entitled to a valuation of his land based upon its potential use as part of a hydroelectric development.

2. In failing to hold that respondent was not entitled to a valuation of his land based upon its potential use as part of a hydroelectric development because respondent had no private property in the water power inherent in the flow of the Hiwassee River.

3. In failing to hold that respondent was not entitled to a valuation of his land based upon its potential use as part of a hydroelectric development because such a development would require a combination, through the exercise of the power

[10] The court excluded $100,000 severance damages for the taking of the Murphy plant, and $18,907.02 severance damages attributable to diminution in value of lands owned by a wholly owned subsidiary, unless within thirty days after the mandate was filed in the District Court, the subsidiary should be made a party (R. 1084).

of eminent domain, of the land owned by respondent with lands owned by others.

4. In failing to hold that respondent was not entitled to a valuation of his land based upon its potential use as part of a hydroelectric development because such development was possible, if at all, only through the combination of respondent's land with other properties not subject to the exercise of respondent's power of eminent domain.

5. In failing to hold that respondent was not entitled to a valuation of his land based upon its potential use as part of a hydroelectric development on the ground that there was no reasonable probability that the land of respondent could have been developed for such purpose in the reasonably near future except by the Government.

6. In treating as admissible, for consideration in arriving at the value of the undeveloped land taken, estimates of possible future profits from a hypothetical and unrealized plan of development.

7. In treating as admissible, for consideration in arriving at the value of the undeveloped land taken, evidence as to the money spent by respondent in promoting a speculative and unrealized plan of development.

8. In holding that a determination of the value of respondent's land may properly be based on prices paid by the Government in purchasing or condemning other lands for the same project.

9. In taking into consideration, in valuing the land taken, the value of the land to the Govern-

ment for its purposes and the effect of the potential demand of the Government for such land.

10. In approving arbitrary valuations of the land unsupported by the evidence.

11. In awarding compensation for damages to land physically separated from the land taken and not unified with it in any present actual use.

12. In awarding compensation for damages to land not taken, although title to such land was in a corporation having no legal or equitable interest in the land condemned, and in awarding compensation to a person who had no legal or equitable interest in the land held to be so damaged.

13. In computing interest on the award for property taken from a date prior to the date on which the declaration of taking was filed involving such property.

14. In failing to exercise its independent judgment in fixing the value of the property condemned without regard to the awards or findings previously made by the commission or by the district court.

15. In affirming the judgment of the District Court as modified.

## SUMMARY OF ARGUMENT

### I

The award of approximately $1,000,000 is predicated largely upon value attributed to the property by reason of its adaptability to water-power

uses. That award is erroneous under *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, which held that an owner of land under and adjacent to a navigable river was not entitled to compensation with respect to the availability of his land for power purposes since such power value depended upon the flow of a stream over which the United States had absolute control. The principles there applied have been recently restated by this Court: "* * * there is no private property in the flow of the stream. * * * If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power" (*United States* v. *Appalachian Power Co.*, 311 U. S. 377, 427).

Although the Hiwassee River is concededly non-navigable at the site of the property condemned, the flow of the river at that point has a direct and immediate effect upon navigation farther downstream, and the construction of a dam at that point by the Government is essential to an integrated system of flood control and general development of the Tennessee River system. Thus there exists here at the point of condemnation the same plenary control over the flow of the Hiwassee (cf. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 523, 525–526; *United States* v. *Appalachian Power Co.*, 311 U. S. 377; *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690) that constituted the basis for the *Chandler-Dunbar* decision.

## II

In any event, even if compensation for water-power value were otherwise proper, the award herein is erroneous to the extent that it includes compensation for water-power value.

A. The award is based, in part at least, upon evidence of imaginary profits that might be derived from a hypothetical private development in which the land condemned, together with other land owned by respondent, would be combined with hundreds of additional tracts of land owned by strangers. That evidence was wholly incompetent and should have been excluded. And even if evidence of the imaginary profits from the hypothetical development were admissible, the record shows that no such profits could have been derived. Respondent's estimates of profits depended not only upon his ability to acquire all of the necessary lands but upon his being able to establish (a) that the imaginary project could be constructed for approximately $30,000,000; (b) that the total annual fixed charges would not exceed 5.55 per cent of the cost of development; (c) that the project would produce substantially 512,500,000 kwh annually of so-called "Saluda-type" energy; (d) that the energy could be produced at a cost of 3.75 mills per kwh; and (e) that the power could be sold for 6.34 mills per kwh. Upon failure to establish any one of these elements, the profits would vanish. Yet, the record

affirmatively shows that each estimate was substantially in error: (a) the cost of the development more accurately estimated would have been between $42,000,000 and $50,000,000; (b) the annual fixed charges would have been approximately 10 per cent; (c) the annual output of power would have been considerably less than respondent's estimate; (d) the cost of production would have been a minimum of 9.5 mills per kwh; and (e) such power could not have been sold at more than from 3 to 3.5 mills per kwh.

B. Moreover, the record further demonstrates that respondent's land had no water-power value. The mere physical adaptability of the property to power uses is not sufficient to give it a market value for that purpose. There must be a reasonable probability that there would be a private power development within the reasonably near future. The record here, however, demonstrates the contrary. Although respondent had begun to acquire the property years before when there was a fair speculative possibility that it would be converted to power purposes, his acquisitions had virtually ceased in 1928. By 1936, when these proceedings were commenced, advances in the art of producing power by steam had so reduced the cost of generation that the development of respondent's property for water-power purposes could have been accomplished only at a staggering loss. Thus, at that time, the value of

respondent's property for power purposes had completely disappeared. There was no reasonable probability that the property would have been developed privately within the near future. And the mere fact that the Government undertook the construction of a dam at that site cannot impart any private power value to the property. Furthermore, that site was not valuable for power purposes alone even to the Government. It was acquired by the United States for use in a multiple-purpose project, involving the control of floods, improvement of navigation, and the production of power only to the extent consistent with planned development of the interstate river system.

## III

Nor is there any other legally sufficient evidence in the record to support the award.

A. Both courts below stressed the fact that respondent had expended about $1,000,000 in connection with the property, and that the award is commensurate with that amount. But the plain fact is that the actual cost of the property condemned was $277,821.56. The larger figure includes a wide variety of expenditures that added nothing to the value of the property, such as New York office expense, travelling expense, the expense of organizing and dissolving a pyramid of some eight or nine corporations, advertising, furniture, fees for engineering studies admittedly obsolete at the time of the trial, interest on bonds,

etc. Plainly, the courts below were not warranted in blending such grotesque items with the actual cost of some $277,000 for the property in arriving at an "investment" of about $1,000,000 against which the award might be measured.

B. Moreover, the courts below erroneously took into account prices paid by the United States for other lands needed for the same project. And even if those prices were to be considered, they fall far short of supporting the award.

## IV

The courts below found that the land, exclusive of its value for power purposes, was worth $10 an acre. The judgment below should be reversed with instruction to enter an award, applying that rate to the 12,000 odd acres involved herein.

In any event, however, the record shows a maximum possible value of $165,000 (at $13 an acre) for the property, which in fact takes into account a possible speculative value for any power element.

## V

The Circuit Court of Appeals erroneously held that respondent was entitled to "severance" damages for supposed injury to other lands owned by respondent that were not condemned. The injury was said to arise from the fact that the remaining lands could no longer be combined with the lands taken for the development of power and

that they therefore lost this power value by reason of the taking. But if, as we have urged, no element for power value should have been included in the principal award, there can be no basis for severance damages since the sole injury of severance complained of was frustration of the hypothetical hydroelectric scheme. Moreover, the remaining lands were geographically separated by considerable distance from the lands taken and from each other, and they were not unified in any existing use at the time of the taking. In the absence of physical contiguity between condemned and remaining property it is settled that severance damages are not allowable where the lands are not combined in an *existing* unity of use.

## VI

The initial declaration of taking, filed January 28, 1936, related only to a small portion of the lands ultimately condemned. Several additional declarations were filed at later dates, thereby bringing into these proceedings all of the property now in controversy. In awarding interest, the courts below not only gave interest from January 28, 1936, on the value of the lands taken on that date, but it also gave interest *from that date* with respect to the power value attributed to the remaining lands taken in the subsequent declarations of taking. This method of computing interest rests on the assumption that the land taken had water-power value and that such value was entirely

destroyed by the filing of the first declaration of taking by the Government. As we argue in Point II, no amount representing power value should have been included in the principal award of compensation; accordingly, the award of interest is excessive.

## VII

Section 25 of the Tennessee Valley Authority Act expressly directs an appellate review of unusual scope in the case of awards made in eminent domain proceedings. The inquiry is not limited to the question whether there is substantial evidence to support the award or whether the award is not clearly erroneous; rather, it extends to an independent revaluation, on the basis of the entire record, of the property condemned, "without regard to the awards or findings theretofore made by the commissioners or the district judges."

### ARGUMENT

*Introductory.* Although this case presents a number of subsidiary issues, there are but two principal questions: first, whether respondent is entitled to have his property valued on the basis of its availability for water-power purposes, and second, whether the property actually had any value for such purposes.

In Point I, we shall undertake to show that the availability of the property for power uses depended upon the flow of the Hiwassee River, which, although nonnavigable at the dam site,

nevertheless had such a direct effect upon the navigable portion below as to subject the river at the dam site to the plenary control of the United States (cf. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508; *United States* v. *Appalachian Power Co.*, 311 U. S. 377; *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690), and that respondent is therefore not entitled to any compensation for loss of any supposed power value under *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53.

In Point II, we shall endeavor to show that the property in fact had no power value.[11] Both the commission and the courts below erroneously assumed that since respondent had acquired the property as a possible site for a hydroelectric development and since the Government was constructing a dam at that very site, the property must have value for water-power purposes. Granted that the land was physically adaptable for dam construction, it had no commercial value for that purpose at the time of taking. It is true that respondent acquired the land over a long period of years, continuing to add to his acquisitions until about 1928, in the hope that it might some day

[11] It is to be observed that section 25 of the Tennessee Valley Authority Act establishes an unusually broad scope of appellate review of the facts, for it directs the circuit court of appeals to fix the value of the property "without regard to the awards or findings theretofore made by the commissioners or the district judge." These provisions will be discussed in Point VII, *infra*.

be developed for the generation of power. He expended something under $300,000 for the land involved herein and several times that amount for collateral purposes (*e. g.*, taxes, office expense, travelling expense, legal expense, advertising, bond interest, engineering studies admittedly obsolete at the time of trial) which added nothing to the value of the property.

At the time respondent began to assemble his holdings and for several years thereafter, a growing market for hydroelectric power existed, and it is doubtless true that for a considerable period the development of this land for hydroelectric purposes had the appearance of a reasonably attractive speculation. By 1936, however, developments in the art of producing power by steam had so reduced the cost of generation that power could be generated by steam at a cost with which only a few exceptionally favored hydro projects could compete, and the cost of generation by steam at that time was 20 per cent less than the cost at which respondent claimed that power could be produced at his assumed development. Thus, at the time these proceedings were instituted the value of respondent's property for hydroelectric purposes had completely disappeared, and his investment in the project had been reduced to salvage value. In effect, he is here seeking to recoup from the Government, at a profit if possible, his total expenditures for promotional purposes as well as for the land itself.

It is apparent that both the commission and the courts below felt that since the Government was condemning respondent's land for a dam site, respondent was entitled to be reimbursed for the total amount of his investment on the theory that the Government's action in constructing the dam established that the site had water-power value. But Hiwassee Dam is not a power dam. It was constructed primarily for flood control, and a substantial part of the cost of the project has been allocated to flood control. Solely as a power dam it would not have been economically justified. Even if no power could be generated at the site at all, it was necessary for the Government to construct this dam to complete its program for flood control on the Tennessee River.[12]

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[12] Moreover, even had Hiwassee Dam been constructed as a power dam, the Government's position would be greatly different from respondent's. The Government has constructed a series of dams on the Tennessee River below Hiwassee, and the regulation of the flow of the Hiwassee has increased the power which can be generated at all of the downstream dams. The water stored at Hiwassee is therefore used by the Government for power purposes not once but several times (R. 925–929).

Another factor which differentiates the Government's position from respondent's is the low interest rate which the Government enjoys. The Government can secure money at a fraction of the cost which private industry has to pay, and this fact alone makes feasible the construction by the Government of hydro projects which could not be undertaken by private capital (R. 926–927).

We shall undertake in Point II not only to demonstrate affirmatively that the property had no water-power value in fact, but also, as a preliminary matter, to show that respondent's evidence of power value (based upon hypothetical profits from an imaginary elaborate four-dam development) was wholly incompetent.

In Point III we shall contend that the award below is otherwise predicated upon incompetent testimony. In Point IV, we shall endeavor to show that the land had a maximum fair market value of $165,000, and shall urge that its real market value, found to be $10 an acre by the district court (exclusive of any value for power purposes), should be applied to the 12,000 odd acres involved herein as the basis for compensation.

In Points V and VI we shall consider the questions relating to severance damages and interest, respectively, and in Point VII we shall discuss the scope of review under section 25 of the Tennessee Valley Authority Act.

## I

### RESPONDENT IS NOT ENTITLED TO COMPENSATION WITH RESPECT TO ANY WATER-POWER VALUE OF THE PROPERTY CONDEMNED

The court below approved an award of approximately $1,000,000 that was based largely upon value attributed to the property by reason of its availability for "dam-site" or "water-power"

purposes.[13] It is our position that the plenary authority of the United States over the Hiwassee River precludes the existence of any private compensable rights in the flow of the stream. We contend, first, that under *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, a landowner is not entitled to compensation with respect to the availability of his land for power purposes where the power depends upon the flow of a stream over which the United States has absolute control, and, second, that although the Hiwassee River is nonnavigable at the point of condemnation, the flow at that point has such a direct and immediate effect upon the navigable portion of the river farther downstream as to give the United States the same plenary control over both the navigable and nonnavigable portions of the river, thereby bringing into play the rule of the *Chandler-Dunbar* case.

1. In the *Chandler-Dunbar* case a power company owned lands under and adjacent to the St. Marys River, a navigable stream in Michigan. Its lands were condemned by the United States.

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[13] The actual market value of the land condemned, apart from any value that it might possess as part of the site of a hydroelectric development, did not exceed $165,000. See Point IV, *infra*, p. 89. The only competent evidence in the record which could possibly support a greater award is the price of $277,821.50 paid by respondent for the land condemned (Res. Exs. 362, 363). The district court found that the value of the land, exclusive of any element for power purposes, *i. e.*, merely for "farming, timber growing, and similar purposes" was $10 per acre (R. 1063–1064).

and the district court had entered an award, the greater part of which represented compensation for the value of the water power. This Court reversed, holding that the power value depends upon the owner's right to erect dams and other structures in the stream, and that such right is always subject to absolute prohibition by the Government, with the consequence that as against the Government, the owner has a mere privilege which may be withheld at pleasure, and not a compensable property right. The Court declared (p. 76):

> The Government had dominion over the water power of the rapids and falls and cannot be required to pay any hypothetical additional value to a riparian owner who had no right to appropriate the current to his own commercial use. These additional values represent, therefore, no actual loss and there would be no justice in paying for a loss suffered by no one in fact. * * *

The principles there applied have been recently restated by this Court in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424, 427:

> The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property: "that the running water in a great navigable stream is capable of private ownership is inconceivable." Exclusion of ri-

parian owners from its benefits without compensation is entirely within the Government's discretion.

* * * * *

* * * there is no private property in the flow of the stream. This has no assessable value to the riparian owner. If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; *nothing for the water power.* * * * [Italics supplied.]

Plainly, therefore, there would have been no right to compensation in this case for water-power value if the property condemned were at the navigable portion of the Hiwassee River, in view of the unquestioned authority of the Government over navigable streams.

2. Concededly, the Hiwassee River is not navigable at the site of the property condemned. But the result must be the same, for the flow of the river at that point has a direct effect upon the navigable portion of the stream and the entire river system, thereby conferring upon the United States the same plenary control over the river at that point which constituted the basis for the *Chandler-Dunbar* decision. Since any private project erected at that site would necessarily have exerted an effect upon the navigable capacity of the lower stretches of the Hiwassee River, as well as of the Tennessee River, and since the erection at that site of a Government-owned project has

been determined by Congress to be an essential part of the navigation, flood-control, and general watershed-development program being undertaken in the Tennessee River basin, the site is as much subject to the dominant control of the United States as it would be if it were located below the historic head of navigation.

The record contains abundant proof that any private power project at the site in question would have affected navigability in the navigable waters below, and this is particularly true of the scheme of development envisioned by respondent (R. 545–550).

It is undisputed that the Hiwasee River is navigable from its mouth to Savannah Ford at mile 41.2 (R. 540–541, 1098; Res. Ex. 189, p. 216). Before 1920 steamboats had navigated more or less regularly up to Charleston, 19 miles above the mouth of the river, and occasionally as far as Savannah Ford (R. 542). During nine months of the year there is a controlling depth for navigation of 4 feet below Charleston and 3 feet below Savannah Ford (R. 541).

The so-called Appalachia dam site, the farthest downstream of those projected in respondent's imaginary development of the Hiwassee River, is only 24 miles upstream from Savannah Ford (R. 549, 1098). The stream flow at that point constitutes 52 per cent of the total water supply between Savannah Ford and Charleston and 44 per

cent of that from Charleston to the mouth of the river (R. 558).

The production of the class of power contemplated by respondent, so-called superprimary power, would have resulted in a substantial impairment of the navigability of the Hiwassee River below Savannah Ford. That class of power was the only one that was ever seriously considered, the scheme being to insure against deficiencies in energy during a possible future dry season by storing water during six months of the year. The testimony of the Government's witness C. T. Barker shows very clearly that this method of operation would have reduced the navigable depths below Savannah Ford by from one to one and one-half feet or more during several months of the year (R. 546). Even operations for the production of continuous power, with the normal load factor and shutdowns on weekends, would have produced sharp daily fluctuations of from two to three and one-half feet in the navigable depths and would frequently have left navigators stranded (R. 548–550).

Such an obstruction is prohibited by the express terms of section 10 of the Rivers and Harbors Act of 1899 [14] and could have been forbidden under section 23 of the Federal Water Power Act, as

[14] "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited . . ." (c. 425, 30 Stat. 1121, 1151).

amended,[15] and section 26a of the Tennessee Valley Authority Act, as amended.[16] Indeed, one of respondent's former subsidiaries (Southern Appalachian Power Company) was specifically advised

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[15] "(b) . . . Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws" (49 Stat. 838, 846).

[16] "The unified development and regulation of the Tennessee River system requires that no dam, appurtenant works, or other obstruction, affecting navigation, flood control, or public lands or reservations shall be constructed, and thereafter operated or maintained across, along, or in the said river or any of its tributaries until plans for such construction, operation, and maintenance shall have been submitted to and approved by the Board; and the construction, commencement of construction, operation, or maintenance of such structures without such approval is hereby prohibited. When such plans shall have been approved, deviation therefrom either before or after completion of such structures is prohibited unless the modification of such plans has previously been submitted to and approved by the Board." . . . (c. 836, 49 Stat. 1075, 1079).

by the Federal Power Commission in 1924 that the proposed Murphy project, located above the Hiwassee site, "involves storage and its management to such an extent that it might be a serious detriment to navigation or materially improve it below," and that the Commission would therefore assert jurisdiction over the development (R. 311).

Even if the protection of the navigable capacity of admittedly navigable streams constituted the only justification for federal jurisdiction, the United States would have an undoubted right to prohibit the proposed development [17] or to license it upon such terms as it might elect,[18] without compensation for the so-called water-power value destroyed or diminished by the assertion of jurisdiction.[19] And under the *Chandler-Dunbar* case, the Government is likewise under no duty to compensate for destruction, through the exercise of its

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[17] See *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 709-710; *United States* v. *Utah*, 283 U. S. 64, 90.

[19] *United States* v. *Appalachian Power Co.*, 311 U. S. 377.

[18] The federal power of control over interstate waters is analogous to the police power of the States to regulate or prohibit the conduct of business enterprises deemed to be inimical to the public interest. Even where the exercise of such power results in the destruction of a business, the Fourteenth Amendment does not require compensation by the States. *Mugler* v. *Kansas*, 123 U. S. 623; *Kidd* v. *Pearson*, 128 U. S. 1. Similarly, the Fifth Amendment imposes no duty on the Federal Government to compensate for business losses resulting from the exercise of its regulatory functions. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264.

power of eminent domain, of a "right" to develop water power where the effect of the contemplated development would have been such that the Government could have forever proscribed any exercise of the "right" in question.

3. But the federal power over interstate streams is not limited to the protection of navigable capacity by prohibition or regulation of proposed private developments. The power to regulate interstate commerce includes the affirmative power to control and develop interstate waters, nonnavigable as well as navigable, for the purpose of promoting navigation, controlling floods, or carrying out general programs of watershed development. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 523, 525–526.

The nature of the Hiwassee River is such that the exercise of federal control at the site in question is necessary for the unified development and regulation of the Tennessee River system in the interests of navigation, flood control, and watershed development. Indeed, it is undisputed that the construction and operation of the Government's Hiwassee Dam has accomplished one of its primary purposes of substantially increasing navigable depths on the lower Tennessee and Mississippi Rivers.

As one of the principal tributaries of the Tennessee River, the Hiwassee, with a drainage area of 2,660 square miles, contributes in times of

high flow a large proportion of the flood waters of the Tennessee and lower Mississippi Rivers (Res. Ex. 204, pp. 96, 99). Any effective flood-protection program in the Tennessee Valley requires the development of strategic storage reservoirs on certain of the larger tributaries. The program of flood protection authorized by the Tennessee Valley Authority Act depends for its effectiveness upon a combination of (1) control of the strategic tributaries by storage developments and (2) the reduction of flood crests on the main stream of the Tennessee through the use of flood storage in the main-stream dams (Res. Ex. 204, pp. 18–19). The efficient use of tributary storage for flood protection in the valleys below depends partially on the time required for the movement of water from the reservoir to the points to be protected. The mouth of the Hiwassee is closer to the city of Chattanooga, Tennessee, than any other major tributary (Res. Ex. 204, p. 99). Accordingly, the time element in controlling floods at that point is sufficiently short to permit highly dependable forecasting and routing.

Hiwassee Dam is located approximately 75 miles above the mouth of the river and only 34 miles above that portion of the river which is concededly navigable both in fact and in law (R. 1098; Res. Ex. 204, p. 97; Res. Ex. 188, p. 53; Res. Ex. 189, p. 216). Any project located at that point is of strategic importance in any program for the control of floods in the Tennessee and Mississippi

River valleys. Such a project would have great potentialities for good or for evil, depending upon the method of operation. A private development for power purposes alone might well result in nullifying all of the flood-protection benefits to be derived from Government projects located below it on the main stream of the Tennessee. Respondent himself pointed out that private operation for power at the particular site in question would be inconsistent with the development of the stream for flood control (R. 151–152, 193).

Under *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426, federal power over interstate waters includes flood protection and watershed development, and the Court has held that the power of flood control extends to the tributaries of navigable streams. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 525. In view of these decisions no distinction can be drawn between the scope of federal power above or below the artificial line denominated the "head of navigation." The pivotal consideration is the effect of the project upon the interstate river system.

A project such as that visualized by respondent, located above the historic head of navigation, may affect interstate commerce more seriously than a similar project on the other side of that artificial line. The construction of a Government project beyond the line may be more essential to the unified development of a river system than projects on the main river. The scope and basis of exercise

of federal power must depend not on the location of a particular site above or below the past limits of navigation but rather upon the relationship of the particular site in question to the federal interests in the interstate system of streams, of which the particular stream in question is an integral part. Cf. *Niagara Falls Power Co.* v. *Water Power and Control Comm.*, 267 N. Y. 265, 196 N. E. 51 (1935), certiorari denied, 296 U. S. 609. Accordingly, whether a particular dam is located above or below the historic head of navigation has no necessary bearing upon its function in the integrated system of flood control, and it would be strange indeed to make the applicability of the *Chandler-Dunbar* case turn upon the almost fortuitous circumstance of the location of the site with reference to the head of navigation.

In *Continental Land Co.* v. *United States*, 88 F. (2d) 104 (C. C. A. 9th), certiorari denied, 302 U. S. 715, the owner of the site of the Grand Coulee Dam was denied compensation for water-power value. And a three-judge statutory court held that the owners of the site of Norris Dam were not entitled to compensation for dam-site value. *United States ex rel. Tennessee Valley Authority* v. *Longmire* (E. D. Tenn.), decided August 23, 1935. The rule of the *Chandler-Dunbar* case was applied to the Grand Coulee and Norris sites in view of the Government's exercise of the commerce power. True, both sites were below the historic head of navigation, but the protection of commerce and the

maintenance of an adequate system of flood control requires Government control over the Hiwassee site no less than over the Grand Coulee and Norris sites. The functions of Norris Dam and Hiwassee Dam in the unified development of the Tennessee River are identical, and the *Chandler-Dunbar* case should govern here, just as it was controlling there.

Had respondent actually made application for federal permission to undertake his hypothetical development, the consent of both the Federal Power Commission and the Tennessee Valley Authority would have been required. The Federal Power Commission would have been authorized to withhold its consent precisely on the ground that the development of the water resources of the Hiwassee River at the site in question should be undertaken by the United States itself.[20] Had respondent's application been denied on this or another ground, the value of his land for power purposes, either to respondent or to a prospective

[20] Section 7 of the Federal Water Power Act, as amended, provides in part as follows:

"'(b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development'" (c. 687, 49 Stat. 838, 842).

purchaser, would have been destroyed without giving rise to any right to compensation for the destruction. If thereafter the Government had decided to undertake a development at the site in question, it would have been obligated to pay respondent, under established rules of law, only the market value of his land at the time of taking. This could not include any amount for water-power value since that value, if it ever existed, would have been destroyed by the exercise of the Government's regulatory power.

The situation in the instant case differs only in that prior to any application by respondent for federal consent, Congress made a determination that the site should be developed by the United States rather than by any private interest.[21] It is difficult to see why the fact that the determination was made by act of Congress rather than by the Federal Power Commission, or that the decision to proceed with a Government project occurred contemporaneously with a prohibition against private development instead of after a lapse of time, should give rise to a right to compensation for claimed water-power value which would not otherwise have existed.

It may be argued that it is inequitable to deprive respondent of the benefits of an investment which was made in the expectation that the water-

[21] Tennessee Valley Authority Act, c. 32, 48 Stat. 58, 61, as amended by c. 836, 49 Stat. 1075 (sec. 4 (j)); First Deficiency Appropriation Act, 1936, c. 689, 49 Stat. 1597, 1607.

power resources might some day be developed by private capital.[22] The same argument was advanced in the *Chandler-Dunbar* case upon much more appealing facts. There the company had actually constructed its project with the approval of the Secretary of War. Nevertheless, when Congress determined that the federal interest required the development of the St. Marys River by the Federal Government, the existing investment was destroyed without compensation. As stated by this Court (229 U. S. at 71):

> In deciding that a necessity existed for absolute control of the river at the rapids, Congress has of course excluded, until it changes the law, every such construction as a hindrance to its plans and purposes for the betterment of navigation.

Similarly, by its specific authorization of the Hiwassee project, Congress decided that the interests of interstate commerce required the absolute control of the waters of the Hiwassee River by the Federal Government and by so doing excluded private construction. The justification for this rule does not rest upon any narrow distinction between "navigable" and "nonnavigable" waters. It rests rather upon the broad proposition that private interests should not be permitted to pre-empt sites of strategic importance upon

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[22] However, as will be shown *infra*, p. 83, respondent's true investment was far less than the amount awarded to him by the court below.

interstate rivers and discourage necessary federal developments by asserting private rights in the running water of interstate river systems.

## II

### EVEN IF COMPENSATION FOR WATER-POWER VALUE WERE OTHERWISE PROPER, THE AWARD HEREIN IS ERRONEOUS TO THE EXTENT THAT IT INCLUDES COMPENSATION FOR WATER-POWER VALUE

In Point I we contended that the principle of the *Chandler-Dunbar* case forbids compensation for any water-power value of the property. In Point II, we now contend that even if the *Chandler-Dunbar* case were inapplicable here, the award herein is nevertheless erroneous to the extent that it includes compensation for power value, because: (A) it is predicated in part, at least, upon evidence of power value that is inadmissible and which in any event does not support the award, and (B) the record affirmatively shows that the property had no water-power value for private purposes.

At the very outset it should be observed that the Hiwassee site itself was not feasible for profitable development, and respondent has never contended that the lands condemned in these proceedings have any power-value when considered alone. Respondent's sole contention has been that these lands at the Hiwassee site are valuable for power purposes in conjunction with other lands, namely, as part of an integrated power development in-

volving four dams, one of which would be located at the Hiwassee site and the other three upon lands not involved in these proceedings (R. 194, 212–213). Although respondent owned or controlled some of those other lands, the major portion thereof was outstanding in many adverse hands and consisted of over 1,000 separate tracts (R. 324, 906–907; Res. Ex. 8).

In order to prove power value for the land condemned, respondent undertook to estimate the annual profits to be derived from an imaginary four-dam project that might conceivably be constructed on the property condemned and on the lands not involved herein; he then capitalized those profits by projecting them arbitrarily into the future, and emerged with a "value" for all the lands, a portion of which he then allocated to the property condemned. The evidence relating to that imaginary project constituted the greater portion of all the evidence presented in this case. We contend that it was wholly inadmissible and in any event does not support the award.

A. THE ESTIMATES OF VALUE BASED ON THE CAPITALIZATION OF PREDICTED FUTURE PROFITS FROM THE HYPOTHETICAL DEVELOPMENT SHOULD NOT HAVE BEEN CONSIDERED AND, IN ANY EVENT, DO NOT SUPPORT THE AWARD

1. *Such Evidence Is Incompetent*

The only evidence introduced by respondent to establish water-power value was the testimony of Powelson and Bevan as to the capitalized value of

the assumed net return from the assumed sale at an assumed price of the assumed output of an assumed project constructed at an assumed cost. Neither of these witnesses testified as to the market value. They readily admitted that they were calculating value by allocating a portion of the capitalized predicted profits to the land in suit (R. 215–222, 489–498; Res. Exs. 284–289).

Attempts to value property by such a method have been consistently rejected by the courts. In *United Gas Co.* v. *Railroad Comm.*, 278 U. S. 300, a utility company sought to include within its rate base a value for its holdings of natural-gas lands based upon an estimate of their value for future use over a period of eighteen years. The company produced experts to testify as to the quantity of gas underlying its holdings and showed that in Pittsburgh there was an unregulated market for natural gas for industrial purposes at 35 cents per thousand cubic feet which would absorb its entire estimated reserve in eighteen years. It was asserted that at this price natural gas could compete successfully for industrial purposes with gas produced from soft coal at the prevailing mine price. Just as did respondent in the present case, the gas company calculated construction costs and the cost of getting its product to the market. Then it estimated that the product when marketed would bring a fair return on the investment, meet all overhead expenses, and leave sufficient profit

to give a present value to the property of $32,000,000. The gas company then produced additional experts who stated that the price which the property would bring if sold by a willing seller to a willing buyer was $30,000,000, $35,000,000, or $45,000,000. These values were based on the estimated or assumed supply of gas to be exhausted at a predicted price in an unregulated market for a future period of about eighteen years. After observing that the common characteristic of the methods of valuation used by the company's experts was their reliance on an uncertain available volume of gas to be sold at an uncertain price for an unpredicatable future, this Court rejected the testimony, saying (p. 318):

> Such predictions can only be made on the basis of data which are not and cannot be known, and most of which are in the highest degree speculative. Such a process of estimating value is without any known sanction.

The courts of California and New York have had frequent occasion to consider cases similar to the present one because of the extensive reservoir developments in those States. The decisions in both States have uniformly rejected the type of valuation testimony relied upon by respondent.[23]

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[23] *San Diego Land & Town Co.* v. *Neale*, 88 Calif. 50, 25 Pac. 977 (1891); *City of Stockton* v. *Vote*, 76 Cal. App. 369, 244 Pac. 609 (1926); *East Bay Municipal Utility Dist.* v.

However, the rule is not one peculiar to reservoir cases but has been consistently applied by the courts in a wide variety of situations.[24]

The District Court, in commenting upon the speculative evidence introduced by respondent, stated that it related to the "adaptability of the

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*Kieffer*, 99 Cal. App. 240, 278 Pac. 476 (1929), rehearing denied, 99 Cal. App. 260, 279 Pac. 178 (1929); *In re Simmons*, 130 App. Div. 350, 114 N. Y. Supp. 575 (1909), order aff'd, 195 N. Y. 573, 88 N. E. 1132 (1909), judgment aff'd *sub nom. McGovern* v. *New York*, 229 U. S. 363. Accord, *Tacoma* v. *Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199 (1910); *In re Bensel*, 230 Fed. 932 (S. D. N. Y.).

[24] *United States* v. *Meyer*, 113 F. (2d) 387 (C. C. A. 7th) (farm land); *Morton Butler Timber Co.* v. *United States*, 91 F. (2d) 884 (C. C. A. 6th); *Stockton & C. R. Co.* v. *Galgiani*, 49 Cal. 139 (1874) (vineyard); *City of Los Angeles* v. *Deacon*, 119 Cal. App. 491, 7 P. (2d) 378 (1932) (rock and gravel pla[illegible]); *Burt* v. *Wigglesworth*, 117 Mass. 302 (1875) (rent from prospective building); *In re Morris & Cummings Dredging Co.*, 96 N. J. L. 248, 119 Atl. 308 (1921) (land claimed to be adaptable for port development); *Sparkill Realty Corp.* v. *State*, 268 N. Y. 192, 197 N. E. 192 (1935) (trap-rock quarry); *New York Cent. R. Co.* v. *Maloney*, 234 N. Y. 208, 137 N. E. 305 (1922) (land claimed to contain deposits of clay and sand suitable for manufacture of bricks); *Matter of City of New York (Blackwell's Island Bridge)*, 118 App. Div. 272, 103 N. Y. Supp. 441 (1907) (rental value of prospective building excluded from value of land); *Hamilton* v. *Pittsburg, B. & L. E. R. Co.*, 190 Pa. St. 51, 42 Atl. 369 (1899) (land claimed to be valuable for buildings necessary in bottling business); *Kossler* v. *Pittsburg, C. C. & St. L. Ry. Co.*, 208 Pa. 50, 57 Atl. 66 (1904) (salt well); *Greenfield* v. *Philadelphia*, 282 Pa. 344, 127 Atl. 768 (1925) (rental value of space in building not yet erected on land condemned).

property in question for use as the site of an integrated hydroelectric power system and its effect is limited to said question" (R. 1054). But the cases hold that such evidence, being essentially unreliable, is not admissible for any purpose and cannot be considered in arriving at an award. Moreover, the evidence was not offered to show adaptability but was put forward as the primary basis upon which respondent rested his claim of value.

Although it is true that both courts below refused to accept in full the figures employed by respondent, they nevertheless approved the entire line of evidence as competent and merely found a lower valuation than that urged by respondent. However, that evidence undoubtedly did play a part in the ultimate finding of value, and both courts below departed from correct principles of valuation in refusing to reject it in its entirety.

*2. In Any Event the Predicted Profits Could Not Have Been Realized.*

Even if it be assumed that respondent may undertake to prove the market value of his property by computing profits which would theoretically be derived from an imaginary future development, the record conclusively demonstrates that the project which he envisioned could have been operated only at a substantial loss.

To support his conclusions as to the prospective profits to be derived from the project, respondent

first assumed that he could acquire all the land necessary for the proposed development and then attempted to establish the following propositions:

(a) That the four-dam project could be constructed for approximately $30,000,000.

(b) That the total annual fixed charges would not exceed 5.55 per cent of the cost of development.

(c) That the project would produce substantially 512,500,000 kwh annually of reserve, or superprimary or so-called "Saluda-type" energy.

(d) That this electricity could be produced for 3.75 mills per kwh.

(e) That the power could be sold for 6.34 mills per kwh.

To support the conclusion that the development would show a substantial profit, respondent would have had to establish every one of the foregoing propositions. And if any one of them is substantially in error, the profits would vanish.

The evidence in this case is overwhelming that not one but all of the foregoing propositions are erroneous.

*a. The cost of constructing the four-dam project*

Respondent's estimates of the profits to be derived from his assumed four-dam development are based upon an estimated construction cost of $30,000,000 (R. 236–237; Res. Ex. 282). This estimate was derived from the testimony of respondent's witness Chambers who testified from plans and estimates which were not prepared with

a view to construction but solely for use in this litigation (R. 366). Several times during the course of the hearings he found it necessary to change estimates to correct deficiencies that had been revealed in the testimony, but when compelled to admit substantial omissions in his plans, he succeeded in finding offsetting adjustments to prevent any increase in the final cost (R. 1009–1016).

The uncertainties and deficiencies in respondent's proof need only be mentioned. The final cost of a project of this character depends to a large degree upon the character of the foundations, the amount of excavation necessary, and the availability of materials. Except for the so-called Powelson site, respondent had no adequate information as to foundation conditions. No borings had been made, and the estimates were based upon surface inspection only (R. 364–365, 394, 398; Comm. Tr. 2209, 2279, 2294). The plans contemplated the construction of concrete spillways at the so-called Nottely site, without provision for the tremendous discharge flume necessitated by the fact that the test holes dug to a depth of 70 feet had failed to reveal any suitable rock foundation (R. 951). The same uncertainty and lack of information prevailed with respect to the sources of aggregates and other necessary material (R. 951).

The foundation conditions at the Powelson site are now definitely known since the Government's Hiwassee Dam has been constructed at that location. The conditions actually encountered proved

much more serious than had been indicated by the test borings (Comm. Tr. 3360–3361). Even with the aid of borings the preliminary information proved inaccurate. No one could predict by looking at the ground what would be encountered at the other sites. No allowance was made for these contingencies in the estimates presented by respondent, who proceeded upon the assumption that he would encounter only the most favorable conditions (R. 363–366, 398).

The Government called five eminent hydroelectric engineers,[25] each of whom expressed the opin-

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[25] These engineers are as follows:

*W. F. Uhl* is a partner in the engineering firm of Chas. T. Main, of Boston, Massachusetts, a firm engaged principally on designs and supervision of the construction of hydroelectric developments and as consulting engineers in connection with such developments. In the course of his duties with this firm, Uhl has had responsible charge of the design and supervision of the construction of forty-five hydroelectric plants. He began designing steam and hydraulic machinery in 1902 (R. 658–660).

*Louis E. Ayres* is a consulting engineer, with thirty years' experience devoted principally to the design and construction of dams and powerhouses. This witness has also had wide experience in the appraisal of utility properties, including the Detroit Edison Company and the Albino Power Company (R. 679–681).

*James S. Bowman* is a civil and hydraulic engineer of twenty-three years' experience, occupying a responsible position with the Tennessee Valley Authority. Prior to his association with the Authority he had been employed by engineering companies principally engaged in the design and supervision of the construction of hydroelectric projects. In his capacity as Head Project Planning Engineer for the

ion that respondent's estimates were inadequate and reached the following conclusions as to the cost of developing these projects if they had been built in 1936:

Uhl—$46,000,000 (R. 666).

Ayres—$50,817,000 (R. 689; Pet. Ct. Ex. A).

Waddell—$42,668,000 (R. 698).

Bowman—$48,286,000 (R. 710).

White—$46,956,000 (R. 589; Pet. Ex. 2-S).

If the cost of these developments had approached the lowest of these estimates, the project would

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Tennessee Valley Authority, he has been in charge of preliminary investigations, designs, and cost estimates on all of the projects constructed by the Authority (R. 704–706).

*Dr. Charles E. Waddell* is a consulting engineer of Asheville, North Carolina. His professional experience included many years of consulting work with utility and hydroelectric projects in the immediate area. This included the appraisal of utility properties for the United Electrical Securities Company and the Old Colony Trust Company of Boston. He has also designed and supervised the construction of a large number of hydroelectric projects and has been employed in an advisory capacity by the Carolina Power & Light Company and the Duke Power Company (Comm. Tr. 5022–5029).

*Ross White* at the time of the trial was general manager of the firm engaged in constructing the $6,000,000 Marshall Ford Dam in Texas. For twenty-six years he had been actively engaged in construction engineering. Since 1925 he had specialized in engineering and construction on hydroelectric projects. From 1933 to 1937 he occupied the position of Superintendent of Construction on Tennessee Valley Authority projects (R. 573–575).

have been operated at a loss even if respondent's remaining assumptions were correct.

*b. The annual fixed charges*

Respondent's estimates of profit are based upon the assumption that the total annual fixed charges on his hypothetical investment would not have exceeded 5.55 per cent of the cost of development.

The normal expectation is that a hydroelectric project will experience annual fixed charges of approximately 10 per cent of the cost of development. This is shown by respondent's exhibit 256 (p. 85) as well as by the testimony of the Government's witness Uhl (Comm. Tr. 4834–4835), who was perhaps more widely experienced in such matters than anyone else who appeared in the case. Contrary to all experience, respondent assumes that his annual fixed charges would be only 5.55 per cent of the cost of development (Res. Ex. 282). Uhl testified that he had never heard of a utility enjoying such low charges (R. 664).

One of the important elements to be considered is the cost of financing. From the testimony of the Government's witness Wheeler, unquestionably the witness best qualified on this subject by experience and actual knowledge of market conditions,[20] it appears that *no* financing for the de-

[20] Wheeler is one of four general partners of Paine, Webber & Company, Boston, Massachusetts, brokers and security underwriters. In the last ten years this firm has handled

velopment of any hydroelectric project by an independent company could possibly be obtained without absolute assurance of an outlet at a satisfactory price for the energy to be produced and definite assurance that the development cost would not exceed the estimate of such cost (R. 843). Such assurances are normally supplied by firm contracts. Respondent has never had any such contracts, nor has he shown even a remote possibility of obtaining such assurances (R. 337–340, 342–344).

Wheeler also testified that even if the independent company should secure these assurances, financing would not be possible because of the refusal of the investing public to buy securities that lack the support of a record of earnings (R. 845). He stated, moreover, that even indulging in the assumption that there was any market whatever for these securities, the cost of money would be at least 6 per cent upon the bonds and 8 per cent to 10 per cent upon the stock (R. 847).

Wheeler testified that even in the hands of the Duke Power Company, the cheapest method of obtaining funds with which to develop a project of the type envisioned by respondent would be by an

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either as underwriters or syndicate participants, many hundreds of millions of dollars of utility securities. As a part of his business, Mr. Wheeler keeps generally familiar with the financial condition of utilities throughout the country and especially those desiring new financing. He made a special study of the Commonwealth and Southern subsidiaries, the Duke Power Company, and the Carolina Power & Light Company (R. 840–841).

equal division between bonds and stocks and that in such case the bond money would cost 4½ per cent and the stock money 6.7 per cent. (R. 842–843.)

This estimate of the cost of money is supported by the independent opinions of Moreland[27] and respondent's witness Baumeister. Moreland's estimate of the cost of money to a mature utility was 4½ per cent for bonds and 6.6 per cent for the stock money (R. 862), while Baumeister's was "6 or 7 per cent" (R. 993).[28]

The looseness of respondent's testimony on financing is demonstrated by his disregard of practical considerations which govern the issuance of

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[27] Moreland, a member of the Boston engineering firm of Jackson & Moreland and Dean of the Engineering Schools at the Massachusetts Institute of Technology, is also a consultant for the Duke Power Company, The Tennessee Electric Power Company, and The Commonwealth & Southern Corporation, and in the discharge of his duties as consultant for these companies has acquired an intimate knowledge of their systems (R. 853–854). His firm also serves many other large utilities in an advisory capacity, including the Boston Edison Company, the Philadelphia Electric Company, the New England Power Company, the Pennsylvania Power & Light Company, and the New York Edison Company.

[28] A comparison of this testimony with Powelson's estimates exposes the tactics by which respondent sought to minimize the cost of production at his proposed plants while inflating the alternative cost of steam. In attempting to establish the lowest possible cost for his hydro power, Powelson based his estimates on an interest rate of 4½ per cent, while Baumeister, purporting to fix the comparable cost of steam, assumed 6 or 7 per cent. Clearly, both cannot be right.

securities by public utilities. Respondent assumed, apparently, that he could finance the entire development by a bond issue (R. 241). This is far from the case. The financing would have to be approved by the State Corporation Commission of North Carolina [28] and possibly also by the Securities and Exchange Commission.[29] And it is unthinkable that any regulatory authority would permit the financing of the entire investment by bonds. The Securities and Exchange Commission has adopted as its objective a maximum of 50 per cent bonds with the remainder in equity securities, and the State commissions adhere to substantially the same standard.[30]

In addition to the cost of money, taxes and depreciation must be estimated in arriving at fixed

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[28] North Carolina Code of 1939, sec. 1112 (18).

[29] Public Utility Act of 1935 (c. 687, 49 Stat. 803, 815).

[30] *See Engineers Public Service Co. (El Paso Electric Co.)*, Holding Company Act Release No. 2535, Feb. 4, 1941. See also *Consumers Power Co.*, 6 S. E. C. 444, where the company, with a total capitalization and surplus of $241,000,000, an excellent earning record, and with active competition for the purchase of its securities, requested the Commission to permit the issuance of $18,000,000 of bonds for refunding purposes and an additional $10,000,000 for general purposes. The Commission permitted the issuance of the bonds for refunding purposes but declined to permit the issuance of the additional $10,000,000 in bonds, on the ground that to do so would unbalance the company's capital structure. The State commissions have applied the same standards with respect to capital ratios. See, *e. g.*, P. U. R. Digest, volume 5, section 93, beginning at page 4316; *Re Wikoff*, 19 P. U. R. (n.s.) 173 (Calif., 1937); *In re North Yarmouth Water Co.*, P. U. R. 1915 E 109 (Me.).

charges. Respondent, who was his own and only witness on this aspect of the case, estimated annual taxes at a total of $228,269, consisting of an ad valorem property tax of $98,299 and a state production tax of $129,970 (Comm. Tr. 2106). His estimate of ad valorem taxes of $98,299 and the estimates of the witnesses for the Government of $211,000 and $314,995, respectively (Comm. Tr. 4060–4061; Pet. Ex. 2-Y), were based upon varying assumptions as to what the tax rate would be after development. While it is purely a matter of conjecture as to what action the taxing authorities would take in the future, the estimates of the Government's witnesses were consistent with the charges experienced by going utilities (R. 862).[32]

Powelson's estimate of $228,000 for all taxes should be compared with Moreland's testimony on the same question. The latter witness showed that the actual taxes paid by neighboring utilities have averaged 2 per cent of development cost (R. 862).

[32] Moreover, Powelson's estimate of the production tax provided by section 203 of chapter 127 of the North Carolina Public Laws of 1937 was one-third too low. He assumed that one-third of his output would be sold within North Carolina and would thereby be exempt from the production tax, but the record does not show that such an assumption is justified. Furthermore, even if the power were sold within North Carolina, the exemption would apply only if the sale were made to a utility for resale, in which case the utility would have to pay the tax and would therefore consider the tax a part of the cost of the purchased power.

Even if this figure is applied to respondent's own estimate of a development cost of $30,000,000, the annual tax bill would approximate $600,000. That, together with the adjustment in the cost of money, would destroy the claimed surplus, even if all of respondent's other estimates were accepted.

Powelson's estimate of the rate of depreciation was .3 per cent, or $90,876 on a development cost of $30,030,000 (R. 370–371; Res. Ex. 282). No such rate of depreciation has ever been heard of in the industry (Comm. Tr. 4835). The testimony of the other witnesses shows that the estimate should more closely approach 1 per cent. (See, *e. g.*, Moreland's estimate of $207,438, Pet. Ct. Ex. 1; see also R. 863, 927.)

From a general consideration of all the testimony upon annual charges, it must be concluded that no independent company could successfully undertake the development of this project and that even if the land were owned by a strong utility such as the Duke Power Company, the annual charges would approximate 10 per cent. Powelson admitted that annual charges aggregating 10 per cent would "kill" his surplus (R. 371), even upon his own assumption as to development cost, output, and selling price.

*c. The amount of power available for sale*

Respondent assumed that his contemplated development would have been capable of producing

a total of 512,500,000 kwh of reserve, or super-primary, or so-called "Saluda-type" power (R. 201–202; Res. Ex. 282). Since he arrived at his gross revenues by assuming that this total output could be sold at 6.34 mills per kwh, it follows that if the output figure has been substantially exaggerated, the calculated profits must be correspondingly reduced. The engineering witnesses gave estimates of respondent's output varying from Uhl's 472,000,000 kwh (R. 665) to Powelson's 587,000,000 kwh of *primary* power (R. 111); and these estimates translated in terms of *super-primary* power output range from 410,640,000 kwh to 512,500,000 kwh.

The variation of opinions in this respect does not arise from any serious dispute as to the volume of water in the Hiwassee River, the amount of rainfall, or the extent of the drainage area, for those facts are fairly definitely established by Government records which have been published over a period of many years. The determinative question is how much of the water energy can be converted into electric energy, and the answer depends only upon the various sources of possible losses.

The inability of turbines and generators to convert all of the water power into electric energy is the most important source of loss. The Government's witnesses testified that the following over-all efficiencies for turbines and generators

should be expected in a project of the type hypothetically set up by respondent: Uhl, Ayres, Bowman, and Waddell, 86 per cent; Roberts, uniquely experienced in this field, 87.7 per cent (R. 665, 683, 707, 702, Comm. Tr. 3948).

The opinions of these witnesses are corroborated by respondent's witness Creager, who testified that 87 per cent is the maximum efficiency "for turbines and generators that are kept in good condition, practically the same condition, same efficiency that they were when purchased, and with the proper maintenance you can approach *very close* to that" (R. 430; emphasis supplied).

The testimony of these witnesses reflected the lessons learned from hundreds of water wheels in actual operation and is far more trustworthy than theoretical calculations in excess of 90 per cent made by Powelson himself, who had no practical experience in this field. Powelson was expressly invited on cross-examination to name plants which had experienced the extraordinarily high percentage of output which he assumed for his project. He was unable to name any but suggested that one plant, Niagara Falls, might approach such efficiency (R. 356). That plant, of course, is not comparable. At Niagara the head is substantially constant, the water is clear and free from silt, thereby retarding deterioration in machinery, and there is a wholly reliable, uniform flow upon which the power companies can count at all times.

*d. The total cost of the power*

Respondent's estimate of cost of 3.75 mills per kwh is based on a construction cost of $30,000,000, an interest rate of 4½ per cent, annual fixed charges of 5.55 per cent, and an annual production of 512,500,000 kwh of reserve, or so-called "Saluda-type" power. But the witnesses who testified for the Government demonstrated that the construction cost would run from $42,668,000 (Waddell, R. 698) to $50,817,000 (Ayres, R. 689; Pet. Ct. Ex. A), that the project would produce only from 425,000,000 kwh (Bowman, R. 708) to 442,000,000 kwh annually (Waddell, R. 698), and that the total annual fixed charges would be approximately 10 per cent. Based on these figures, the cost of production of electricity would be a minimum of 9.5 mills instead of 3.75 mills per kwh (R. 934–935).

*c. The price at which the assumed output could be sold*

Respondent's final assumption was a selling price for his power of 6.34 mills per kwh (R. 203; Res. Ex. 282). But that figure is wholly excessive, for, as will be shown, the best expectation was a selling price of from 3 to 3.5 mills, and upon the basis of such a selling price, the property could not have any capitalized value, even if respondent's conclusions as to cost (3.75 mills) be accepted in full.

Since it is conceded that the only possible market for so large a block of power as that proposed

by respondent would be the power systems operating in the area (R. 708, 959), it is clear that the selling price would depend upon two factors, namely, the alternative cost at which those systems could produce equivalent power themselves and the urgency of the need for the particular class of power proposed to be produced at respondent's hypothetical project (R. 854, 858, 957–962).

However, respondent's assumed selling price of 6.34 mills per kwh is not derived from a comparison of the alternative cost of production by steam or even from the prices at which power has been sold in the area in recent years but from the fact that *in 1927* the Lexington Water Power Company sold the output of its Saluda plant at that price (R. 203; Res. Exs. 230, 231). The significant changes in the efficiency and economy of steam generation which have occurred since 1927 make that one isolated sale useless as a guide to present prices. The value of respondent's hydro energy delivered at 35 per cent load factor depends not upon the terms of a contract entered into nearly ten years before the taking of this property but upon the present cost of generating energy by steam at the same load factor. The Government's witness Moreland[31] went further and showed that even at the same cost, steam power would be preferable

[31] See footnote 28, *supra*, p. 54.

because of the flexibility of operation of a steam plant, resulting in what were termed "internal benefits" (R. 858).

Moreland, whose work has often required studies and decisions on the selection of the cheapest of alternative sources of generation (R. 865–866), estimated that the value of respondent's energy would not exceed approximately 3 mills. In support of his conclusion he pointed out that in 1927 (the date of execution of the contracts between the Lexington Water Power Company, the Duke Company, and the Carolina Company) the cost of generation by steam was far greater than in 1936 (R. 856–858). He further pointed out that in determining the price it could afford to pay for purchased energy, a power company would make the comparison on the basis of the costs of its very latest units (R. 858).

Respondent's proposed method of operation assumed that his plants would be operated 35 per cent of the time and idle 65 per cent of the time because the available water supply would be utilized in a short period of operation to firm up secondary power on existing utility systems (R. 133–134, 140–141, Res. Exs. 237–239).[34] A steam plant has a great advantage in this respect. It

[34] Krug testified that these utility systems had since 1927 gradually been firming up their own secondary power and thus had little present need for "Saluda-type" power (R. 961).

would be used for the same purpose as respondent's proposed hydro plants and would still be of great residual utility during the rest of the year when it could be used, with a resulting saving of expense, as a substitute for other older and less efficient plants (R. 858, 863). Furthermore, a saving in operating costs could be effected by shutting down the plant when not needed (R. 863)—an obvious advantage over a contract to take and pay for a stipulated amount of energy from respondent each year whether needed or not.

Moreland estimated separately the alternative cost of generating electricity by steam at 35 per cent load factor for each of the possible purchasers of respondent's prospective output—the Duke Power Company and the Commonwealth and Southern system. The cost in the Commonwealth and Southern system, with provision for spare or reserve equipment of 15 per cent and after deduction for the internal benefits discussed above, would be 4.12 mills per kwh *at the load center*. The corresponding figure for the Duke system would be 3.71 mills per kwh. The value of respondent's 35 per cent load factor energy at the market would therefore be limited to a maximum of 4.12 mills in the Commonwealth and Southern system and 3.71 mills in the Duke system (R. 860–864; Pet. Ct. Ex. D).

To determine the value of respondent's energy at the plant on the Hiwassee River, the cost

of transmitting respondent's energy from the Hiwassee River to the market must be deducted. Using both the estimated cost of transmitting a distance of 100 miles to the Commonwealth and Southern system submitted by respondent's witness Sindeband and the estimate of the Government's witness Hapgood, Moreland estimated the value at the site to be 3.02 mills per kwh to Commonwealth and Southern if Sindeband's estimate of transmission cost were accepted, and 2.99 mills per kwh on the basis of Hapgood's estimate (R. 868; Pet. Ct. Ex. H). The value to the Duke Power Company would be even less.[35]

The maximum selling price of 3.02 mills per kwh (R. 868; Pet. Ct. Ex. H) is even less than the cost of 3.21 mills which Powelson last estimated would be the total cost of generation alone (R. 829), and much less than his original estimate of 3.75 mills for the cost of generation and stepping

[35] Moreland also made his own estimate of respondent's cost of production. This estimate accepted, without approving, respondent's estimates as to cost of development and also as to certain minor items of annual charges. The witness used his own estimates as to taxes (2 per cent on investment), the cost of money (5.55 per cent, on the assumption that half would be raised by 4½ per cent bonds and the remainder by stock yielding 6.6 per cent), and depreciation and added a charge for insurance (R. 862–863), a factor ignored by respondent. His conclusion was that even using Powelson's estimate of development cost as a basis for the calculation, the energy would cost 4.65 mills per kwh at the project site, or 1.65 mills (more than 50 per cent) in excess of the price at which it could be sold (R. 869; Pet. Ct. Ex. I).

up to transmission voltage (R. 213; Res. Ex. 282).

Since the basis for respondent's estimate of a sale price for his power was the price of 6.34 mills per kwh fixed in the Saluda contracts (R. 203; Res. Exs. 230, 231), the admissions of respondent's witness Baumeister on the changes in the art since the date of those contracts are sufficient in themselves to destroy respondent's case. This witness stated that steam generation in this area prior to 1927 was "just about as sorry as in any other part of the country," was in fact "pretty terrible," "expensive," and "very inefficient," and that the efficiency of steam generation in this area has improved steadily since 1927 (R. 998). He admitted that although in 1927—the date of the Saluda contracts—1.6 pounds of coal were required to produce one kwh, the requirement is now under one pound per kwh (R. 999).

The present limits on the sale price of power, as shown by the testimony as to the cost of generation by steam, are further demonstrated by the prices at which it has been sold in recent contracts. J. A. Krug, Chief Power Engineer for the petitioner, testified that on the basis of the standard TVA power rates the average rate per kwh for large blocks of power at 35 per cent annual load factor would vary from about 3 mills per kwh to about 5.67 mills *delivered to the customer*, depending upon the manner in which the

customer uses the energy during the year (R. 956–957).[36] In all his experience no major power company or industry has expressed an interest in purchasing power at a load factor as low as 35 per cent (R. 956), because the major utility systems do not now require power at such a low load factor. Even if they did, they could produce it more cheaply themselves (R. 958).

The price which the Authority will receive under its contract with the Commonwealth & Southern Corporation will average from 3.1 mills to 3.6 mills per kwh without the construction of any additional facilities by the purchaser (R. 955; Pet. Ct. Ex. P), and the Authority's policy in its contracts with industries and utilities has been to obtain the highest price the market afforded (R. 960).[37]

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[36] These figures should not be compared with respondent's figure of 6.34 mills at the dam site. For purposes of comparison the cost of transmission from source of generation to market must be deducted from Krug's estimate.

[37] On the basis of his experience, this witness stated that the maximum premium which could be obtained for "Saluda-type" power would be .5 or .6 of a mill per kwh, assuming that any customer could be found who desired to take power at such a low load factor (R. 960–961). There are only two possible markets in the Southeast for "Saluda-type" power, the Commonwealth and Southern southeastern system and the Duke Power Company (R. 959).

Perhaps the most significant evidence on this phase of the case is Krug's uncontradicted testimony that on the basis of actual operations of power systems in the five Southeastern States closest to the Hiwassee project in the fifteen-year period preceding the date of condemnation—1920-1936—

It is therefore clear that whether the energy from respondent's projects be valued in the light of the cost of generation at an alternative steam plant or whether it be valued in accordance with the prices paid under actual contracts for energy, the hydroelectric power in question would not be worth more than 3 to 3½ mills per kwh (R. 868, 960–961).

B. RESPONDENT'S LAND IN FACT HAD NO WATER-POWER VALUE, BECAUSE THERE WAS NO REASONABLE PROBABILITY THAT IT WOULD BE COMMERCIALLY DEVELOPED FOR POWER PURPOSES WITHIN THE REASONABLY NEAR FUTURE

1. The mere physical adaptability of the property to power uses is not sufficient to give it value for that purpose. It is essential that the contemplated use have a reasonable probability of becoming a reality within the reasonably near future.

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only 13 per cent of respondent's estimate of the potential output of "Saluda-type" power (512,500,000 kwh annually) could actually have been used for the "superprimary" purposes on which respondent's whole case is predicated (R. 962–964; Pet. Ct. Ex. R). An additional 54 per cent might have been used to replace steam generation, the least valuable use for power, and the balance would have had to be wasted. As the witness pointed out:

> . . . that means that it would take seven or eight years to use up a single year's supply for these super primary purposes.
>
> If you translate that back to the cost of the kilowatt hours used for that purpose, without taking into account the steam replacement purposes, you would get a cost of this power for firming up, of about five cents a kilowatt hour [R. 964].

The applicable rule is clearly set out in *Olson* v. *United States*, 292 U. S. 246. In approving the exclusion of evidence concerning the special adaptability of the lands involved for reservoir purposes, this Court stated (p. 255):

> The highest and most profitable use for which the property is adaptable and needed or likely to be needed *in the reasonably near future* is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. [Italics supplied.]

The judgment below is based on findings concerning physical adaptability, to the effect that this land was so situated that when combined with other lands, it could be used for the construction of dams and the impounding of stored waters. The vital question of whether there was a reasonable probability that it would have been so used is completely disregarded. There are no findings as to when the development would have been undertaken or as to how much longer the land would have remained unused. This is not surprising since there is nothing upon which such findings could have been based, except Powelson's unsupported surmise that the time for development was rapidly approaching and the frank admission of respondent's witness Bevan that there is no way of estimating how long the lands would have lain

dormant (R. 507). We know, on the other hand, that the period of dormancy had lasted for many years, that no prospective purchaser had shown any interest either in the land or in the power to be produced at the hypothetical projects, and that no capital was available or in prospect.

The opinion in *Continental Land Co.* v. *United States*, 88 F. (2d) 104 (C. C. A. 9th), certiorari denied, 302 U. S. 715, in which the United States was seeking to condemn the site for the Grand Coulee Dam, is helpful. There, as here, the court had before it the contention that the land should be valued on the basis of its adaptability for reservoir purposes, supported by expert engineering testimony that the land was peculiarly adaptable for use as a dam site, that private capital was always ready to develop a site so particularly suitable, and that private development was wholly feasible in all respects. The court first held that since the land was located on a navigable stream, application of the doctrine of *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, prevented recovery for any value it might possess as a dam site. But it went on to point out that the same result would be reached on independent grounds since (88 F. (2d) at 110):

> There is no evidence that there was any reasonable probability of combination in a *reasonably near future*, or at all, of these lands for private use.

See also *In re Simmons*, 130 App. Div. 356, 114 N. Y. Supp. 575 (1909), aff'd, 195 N. Y. 573, 88 N. E. 1132 (1909), aff'd *sub nom. McGovern* v. *New York*, 229 U. S. 363; *Brett* v. *United States*, 86 F. (2d) 305 (C. C. A. 9th); *Gilmore* v. *Central Maine Power Co.*, 127 Me. 522, 145 Atl. 137 (1929); *Seaboard Air Line Ry.* v. *United States*, 275 Fed. 77 (E. D. S. C.); *State Highway Comm.* v. *Brown*, 176 Miss. 23, 168 So. 277 (1936).[38]

Of course, where property is readily convertible to another use, that fact may be shown in determining its value (*McCandless* v. *United States*, 298 U. S. 342; cf. *Boom Co.* v. *Patterson*, 98 U. S. 403); but where, as is the case here, there was no expectation of any such extensive commercial power development within the reasonably near future as

[38] These last two cases illustrate the legal effect of expectation too long deferred. In each case the owner of undeveloped land claimed that it had been acquired and held over a period of years with a view to its use for industrial purposes for which it was well adapted. In reversing a verdict based upon this expectation, the Mississippi court commented upon the long-deferred hope as follows: "After showing that the property is adapted to a particular use and available therefor, it must appear that there is some probability that the land will be used for such purpose within a reasonable time. The fact that a manufacturing plant might be established upon the land within twenty years would add but little intrinsic present, determinate, market value to the land, whereas the probability that such plant might be established thereon within a year or two would add materially to the present market value thereof, and would be a basis upon which a verdict could be rendered" (*State Highway Comm.* v. *Brown*, 176 Miss. 23 at 33–34).

was conjured up by the respondent, no value can be attributed to the property on account of its adaptability for power purposes.

2. The fact that there was no probability of any private power development within the reasonably near future is fully confirmed and emphasized by (a) the past history of the property, (b) the fact that power could be produced only at a financial loss, and (c) the fact that it was exceedingly doubtful whether respondent could acquire all of the hundreds of additional tracts of land owned by others that were necessary for his hypothetical development.

a. Respondent or one of his predecessors began the purchase of his lands about 1913. After twenty-three years, only about one-half of the land required for one of the dams (the hypothetical Powelson project) and only a fraction of the land needed for the ultimate development of the four-dam system had been acquired (R. 324, 900; see Statement *supra*, pp. 7–9). During that time respondent and his predecessors had interested no utility in the project, had interested no financial house in the prospects of financing, had received no offers from prospective purchasers, and had obtained no market for the potential output (R. 342–343, 366, 385, 338).

The period from 1920 to 1931 was the most active period for the development of hydroelectric sites ever experienced in the Southeastern region (R.

324–326). During this period the market for power in this area, to use the language of Powelson, was "growing fast" (R. 337). During this time the Alabama Power Company built three hydroelectric plants and enlarged others; the Aluminum Company of America built five hydroelectric plants; the Georgia Power Company built ten; the Tennessee Electric Power Company built two; the Duke Power Company built nine; and the Lexington Water Power Company built the Saluda project (R. 325–326). All of these developments were in the same vicinity as respondent's proposed projects.

Despite this unusual activity, no prospective purchaser ever manifested any real interest in acquiring this property. Very few were sufficiently interested even to look at it (R. 342–344, 359–360) But the action of those few who did is even more significant—shortly after their examinations, they selected other sources of power to meet their needs. In 1930, soon after the president of the Georgia Power Company looked at the property, his company began construction of the Atkinson steam plant (R. 343). Immediately after an engineer from the Carolina Power & Light Company looked at the property, that company constructed its own Waterville Dam (R. 359–360).

Substantially as much land had been acquired by the end of 1929 as respondent owned when this suit was instituted in 1936 (R. 323–324; Res. Exs. 187, 363). Indeed, the land purchases had practically

ceased by the end of 1928, and the great bulk of the land had been purchased by the end of 1926. It is true that during the early part of the period respondent was involved in litigation, but this had been concluded by 1924 or 1925 (R. 337). Accordingly, the fact that no development occurred during the 1920's can be explained only on the ground that the project held no attraction to possible purchasers or developers. Although respondent was admittedly free from the obstacles of litigation by 1925, although the period of active hydroelectric development continued for some six years thereafter, although the bulk of the land was acquired by 1926 and practically all of it prior to 1929, respondent had not succeeded in developing the property, and at the time of taking there was no reasonable prospect of development."

b. That there was no probability of any private development of respondent's land at the time of the taking is plainly shown by the fact that the market price for power in the surrounding area was less than respondent's own estimates of the cost of production. Clearly, a prospective purchaser would be interested only if there were an assured market for the power at a price in excess of the cost of

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" In each annual report of the Southern States Power Company to the North Carolina Corporation Commission, from 1929 to 1935, it was stated that the properties consisted "largely of wild lands and water rights in the mountains," and "until the financing of its developments have [sic] been arranged for," the lands "are of little value except for farming purposes, their original use" (R. 383; Pet. Exs. J to O).

production. There has never been any question as to the existence of a large and expanding market for electric power in this area. It has been conceded that any power which might be produced could be sold at some price. The only controverted issue is at what price.

Even if respondent's assumption as to cost of production (3.75 mills per kwh) be accepted in full, we have shown in detail, *supra*, pp. 60–67, that the power could not be sold for more than 3 to 3.5 mills per kwh, with the consequence that the property could not have any commercial value for the generation of power. And if the more realistic estimate of the cost of production (9.5 mills per kwh), *supra*, p. 60, be adopted, the output could not be sold except at a staggering loss.

Plainly, in these circumstances, there was not any probability that the property in question would be developed in the reasonably near future as a commercial enterprise.

c. The absence of any water-power value is further emphasized by the fact that hundreds of additional tracts of land required for respondent's hypothetical development were outstanding in adverse hands. Although it is true that market value of land may sometimes be determined in the light of its possible combination with other property, such combination must be reasonably probable. Respondent has attempted to avoid these difficulties by relying upon the power of eminent domain which North Carolina had given to him or

his predecessor. But it can hardly be assumed that the power of eminent domain would in fact have been exercised to promote an unprofitable venture, and furthermore, many of the tracts were beyond the reach of respondent's power of eminent domain."[40] Yet respondent has taken the position that, as a result of his power of eminent domain, the case must be viewed as though the necessary combination of lands had already been completed (R. 154, 261–263, 284, 511).

These considerations apart, however, respondent's position conflicts with the principle underlying the rule that a landowner cannot be permitted to establish reservoir value where the combination of the necessary lands is possible only through the use of the power of eminent domain. *New York* v. *Sage*, 239 U. S. 57; *McGovern* v. *New York*, 229 U. S. 363; *Medina Valley Irr. Co.* v. *Seekatz*, 237 Fed. 805 (C. C. A. 5th).

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[40] Respondent was without power to condemn the following properties which he would have had to acquire: the Andrews hydroelectric plant (R. 263–265, 758–759), the lands held in trust by the United States for the Cherokee Indians (Comm. Tr. 4412–4413, 4423–4424, 5245–5248, 5599), other lands belonging to the United States (R. 624) and the State of North Carolina (Comm. Tr. 2754–2756), and lands in the States of Georgia and Tennessee where respondent had no power to acquire by condemnation (R. 32, 35–36; Comm. Tr. 4419–4429, 3344; Res. Ex. 8). In addition, there is grave doubt as to the power of respondent to condemn the right to flood various properties already devoted to a public use, such as cemeteries, highways, railroad tracks, telephone and telegraph transmission lines, and the sites of schools and churches (R. 272–275; Comm. Tr. 4409–4429).

Respondent has sought to distinguish these decisions on the ground that none of them involved a landowner who himself possessed the power of eminent domain. But it is of no significance that respondent has that power. Thus, in *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199 (1910), the Washington Supreme Court held that a public service company was not entitled to water-power value for lands taken for a municipal power project and that the fact that the power company possessed the right of eminent domain and therefore could combine properties necessary for development was not to be considered.

This view is supported by strong considerations of public policy. The underlying purpose of the power of eminent domain is to prevent trading upon the necessities of the public interest by owners of sites peculiarly favorable for public works and thus to preclude the very type of claim which respondent is advancing in this case.

When the State of North Carolina conferred the power of eminent domain, it delegated part of its sovereign power for the purpose of enabling respondent to perform a public service. The power was conferred to enable him to acquire lands at their fair market value rather than at prices wrung from him by landowners in a position to take advantage of his special need for the properties and their peculiar value to him. The power was not conferred upon respondent for his own benefit but for the benefit of the public in order that he might

sell electricity to the public at rates which would not be enhanced by reason of exorbitant prices paid for land needed for a project. Respondent's argument overlooks the fact that the power of eminent domain is a special privilege which he must use for the public benefit. He takes the position that it is a personal privilege which he can use to compel the United States to pay him a price for the lands condemned which bears no relation to their actual market value and which exceeds the amount that would be payable to anyone not possessing the privilege.[41]

In *New York* v. *Sage*, order entered *sub nom. In re Bensel*, 230 Fed. 932 (S. D. N. Y.), the City of New York was condemning land for a reservoir, and the owner, in attempting to establish special

[41] If respondent's argument is accepted, the power of eminent domain would enable its possessor to acquire lands from their owners as ordinary land, while automatically entitling him to receive from the Government a price computed on the assumption that reservoir value has been added merely by the transfer. Moreover, the power of eminent domain is a revocable privilege which the State of North Carolina could take away at will. The acceptance of respondent's contention would mean that a State can, by conferring the power of eminent domain, increase the liability of the Federal Government and that the Federal Government must compensate for a revocable privilege granted by the State. Cf. *Kohl* v. *United States*, 91 U. S. 367, 373–374. These considerations of policy are equally applicable whether the enhancement in value is claimed to result from the possession of the power of eminent domain by the landowner or by other prospective purchasers. See Orgel, *Valuation under Eminent Domain* (1936), Sec. 88, p. 288.

value for the prospective use, offered to prove that other cities were competing for the land, thereby creating an actual market demand. But Judge Learned Hand concluded that any market created by the demand of these cities must be excluded from consideration because they, like the taker, would proceed by eminent domain.

Respondent has insisted that his case is to be distinguished from all of the reported reservoir cases because he had a "prior right of development" under North Carolina law. He apparently means only that by virtue of his prior entry on the scene and his declaration of intention to develop certain projects, he obtained the right under North Carolina law to prevent any interference with his plans by subsequent *private* interests seeking to develop the same sites, as well as the right to condemn lands necessary for his projects.[42]

[42] This is the explanation given by Powelson in attempting to explain away his prior testimony in the Hiawassee River Power Company litigation. He says in substance that when these same lands were owned by the Hiawassee River Power Company they were worth only from $5 to $20 per acre because respondent had a right prior to that company and could prevent its proposed development by exercising the power of eminent domain (R. 375–381). Respondent's so-called prior right was defined by the Supreme Court of North Carolina in *Carolina-Tennessee P. Co.* v. *Hiawassee River P. Co.*, 188 N. C. 128, 123 S. E. 312 (1924), as follows:

"As between the Carolina-Tennessee Power Company and the Hiawassee River Power Company, the right, as well as the prior right of the petitioner to condemn the lands in dispute and to acquire them for use in its hydroelectric or water-

The District Court, without any analysis of the contention, simply stated that the "prior right" "constituted a valuable right, which is destroyed by this condemnation proceeding" (R. 1055). If this is construed as a holding that respondent is to be compensated upon the basis of a prospective use that could become a reality only through the exercise of the power of eminent domain, it is of doubtful soundness in view of the holdings in *McGovern* v. *New York*, *supra*, and *New York* v. *Sage*, *supra*. If construed as holding that the "prior right" is a vested property right for which compensation is to be made in addition to and independently of the value of the land, it is inconsistent with the line of decisions defining such "prior right" as a mere revocable privilege for which a state cannot be required to make compensation,[43] and also decisions of this Court holding that the

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power development must be considered as settled by our former decisions. In the absence of unreasonable delay or evidence tending to show a want of good faith, or abandonment of its purpose on the part of the petitioner, or some specific legislative authority granting such right, the defendant may not acquire a water-power within the water-power already marked out by the petitioner, and thus destroy the petitioner's superior rights" (188 N. C. at 130).

[43] *People* v. *Adirondack Ry. Co.*, 160 N. Y. 225, 242–243, 246, 54 N. E. 689 (1899), aff'd, *Adirondack Ry.* v. *New York State*, 176 U. S. 335; opinion of Shiras, J., in *Sioux City & D. M. Ry. Co.* v. *Chicago, M. & St. P. Ry. Co.*, 27 Fed. 770, 774–775 (C. C. N. D. Iowa); *Louisville & N. R. Co.* v. *Western Union Tel. Co.*, 268 Fed. 4 (C. C. A. 6th), aff'd, 258 U. S. 13; *Ramapo Water Co.* v. *New York*, 236 U. S. 579.

condemnor is not required to compensate for business losses resulting from the taking."[*]

3. In concluding that the property was valuable for power purposes, the court below erroneously took into account the likelihood of a governmental development. The opinion discloses an underlying assumption that the acquisition of respondent's land by the Government as the site for a dam is in itself proof that the land was valuable to others as the site for a power dam. Thus, the court stated (R. 1076):

> Even if it be conceded that the property was one which could be developed profitably as a power site only by some company or governmental agency enjoying a low interest rate, its availability for such development should not be ignored in placing a value upon it, particularly where it is being acquired for the very purpose of such development.

But in determining whether there was a reasonable probability of development of the land for power purposes, it is the probability of *private* development alone which should have been regarded as material; the likelihood of governmental development cannot properly be considered. *Olson* v. *United States*, 292 U. S. 246; *McGovern* v. *New York*, 229 U. S. 363; *New York* v. *Sage*, 239 U. S. 57; *Five*

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[*] *Mitchell* v. *United States*, 267 U. S. 341; *Bothwell* v. *United States*, 254 U. S. 231; *Joslin Co.* v. *Providence*, 262 U. S. 668.

*Tracts of Land* v. *United States*, 101 Fed. 661 (C. C. A. 3d); *Continental Land Co.* v. *United States*, 88 F. (2d) 104 (C. C. A. 9th), certiorari denied, 302 U. S. 715; *In re Bensel*, 230 Fed. 932 (S. D. N. Y.).

Moreover, the Hiwassee site was not valuable for power purposes alone even to the Government. The land was acquired by the Government for a multiple-purpose development rather than a power development, and the statement of the court below that it was "being acquired for the very purpose of such [power] development (R. 1076)" indicates how completely the difference escaped its attention.

Hiwassee Dam was constructed primarily for the purpose of controlling the destructive flood waters of the Tennessee and Mississippi Rivers. It is an essential part of any adequate flood-control program (Res. Ex. 204, pp. 18–20, 96, 99). In addition the dam is useful in regulating the navigable depths in the river below, and it is also used in the production of power. But Hiwassee Dam could not have been economically justified solely as a power dam, disassociated from the integrated control of the Tennessee River and its tributaries (R. 925–927). The determining factor in the selection of this site by the Government was not its feasibility as a power site but the need for the construction of a flood-control dam at this particular location. Regardless of whether any power could have been gen-

erated at the site, it was necessary for the Government to construct this dam to complete its program under the Tennessee Valley Authority Act.

Even viewed solely from the standpoint of power development, the value of the site to the Government is no guide to its value to any other purchaser. The Government had constructed or was constructing a series of dams on the Tennessee River below the mouth of the Hiwassee. The regulation of the flow of the Hiwassee increases the power which can be generated at all of the downstream dams. Thus, ever as a power project the real value of this site to the Government is not derived from the power generated at the Hiwassee site but from the operation of this storage project as a part of the complete development of the Tennessee River (R. 925–927).

## III.

### THERE IS NO LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE AWARD.[45]

In Point II we have explored at length the evidence relating to the alleged power value of the property, and we have endeavored to show that the record affirmatively discloses the absence of any such power value. There remain to be considered two other lines of evidence that might superficially ap-

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[45] In view of the broad powers of appellate review under section 25 of the Tennessee Valley Authority Act, discussed more fully in Point VII, *infra*, pp. 103–105, the question here is not the usual one on appeal, *i. e.*, whether there is support for the judgment. Rather, the Court is entitled to look at the entire record to determine whether the award is correct.

pear to support the award and which were relied upon by the court below: first, the alleged cost of the property to respondent and second, the prices allegedly paid by the Government for other lands in connection with the same project.

A. RESPONDENT'S TRUE INVESTMENT WAS $277,821.56, THE ACTUAL COST OF THE PROPERTY CONDEMNED, RATHER THAN THE ARTIFICIAL AMOUNT OF ABOUT $1,000,000 RELIED UPON BY BOTH COURTS BELOW WHICH INCLUDED A WIDE VARIETY OF PROMOTER'S EXPENDITURES WHOLLY UNRELATED TO THE VALUE OF THE PROPERTY

In support of the award both courts below stressed the fact that respondent had expended about $1,000,000 in the acquisition of the property. Indeed, the Circuit Court of Appeals pointed out (R. 1075) that the award which it approved merely provided for repayment of the amount invested plus 3 per cent simple interest. But the plain fact is that the actual cost of the property was $277,821.56.[*]

The larger figure includes not only the actual cost of the property but also a wide variety of expenditures made by respondent or his predecessors over a long period of years which added nothing to the value of the property. Thus, these expenditures included: Taxes ($73,412.68); New York office expense ($82,480.81); legal expense (R. 304–

[*] The entire cost of all the lands acquired by respondent and his predecessors was $466,093.42 (Res. Ex. 187). But these lands include, not merely the property condemned (12,679.94 acres), but also some 8,000 acres not involved herein (Res. Exs. 362, 363). The portion of the cost of all the property allocable to the lands condemned is $277,821.56.

309), involving, *inter alia*, the expense of organizing and dissolving a pyramid of eight or nine separate corporations ($94,074.71) (R. 304–309); travelling expense ($14,321.68); expenses incident to the operation of the Murphy plant ($64,358.46); interest and amortization with respect to Murphy bonds ($194,847.50); surveying expense, involving preparation of topographic maps based primarily on Government surveys readily available to any prospective purchaser (Comm. Tr. 487–488, 1276–1277, 1281–1282, 1993–1994), and other work admittedly unnecessary ($84,632.73); and a number of other expenditures such as fees for engineering studies admittedly obsolete at the time of the trial, advertising, and furniture (R. 282; Res. Ex. 187).

In asking this Court to approve the award, respondent is in essence seeking to recoup, at a modest profit, his improvident promoter's outlay—an outlay that was nearly three times the actual cost of the property condemned. We submit that both courts below have seriously misused the evidence of respondent's expenditures, and have in effect reimbursed him with interest for his unsuccessful speculative venture. The true evidence as to cost does not support the award.

B. THE COURTS BELOW ERRONEOUSLY RELIED UPON PRICES ALLEGEDLY PAID BY THE GOVERNMENT FOR OTHER LANDS NEEDED FOR THE SAME PROJECT

The court below stated that the Government by prior negotiation had purchased 9,500 acres in the Hiwassee area at a total price of $396,894.79 (R.

1077). This represented an average price of approximately $41 an acre. However, the property purchased included urban property within the town of Murphy and improved tracts used for churches, schools, and mills, having a much higher value per acre than respondent's unimproved mountain land (R. 898–899). After adjustments for such differences, the average per-acre price for land comparable to that of respondent was $27.70 (R. 909), the application of which figure would result in a total valuation for the lands in suit of $351,208.30. The court, however, disregarded this difference in the character of the land, stating (R. 1077–1078):

> It is true that a small part of the property thus purchased was town property and that some of the other had been improved and its value increased as a result of such improvement; but, on the other hand, the availability of the land for power purposes constituted its chief element of value as a whole, and it was for such purpose that it was being acquired.

Pursuing the theory that the value of the land to the Government should determine the price to be paid, the court stated that of 9,500 acres acquired from others at a cost of $396,894.79, only 1,229 acres were actually to be flooded. It then noted that to acquire other lands necessary for the development the Government had spent $158,636, including $96,305 for a tale mine, and that all of

the property acquired from others made up only one-fifth of the reservoir. It then stated (R. 1078):

> If a purchaser felt justified in expending $555,531 for lands to provide approximately one-fifth of the basin of the reservoir, it would not seem unreasonable to place a value of $976,289.40 upon lands which would provide not only the remainder of the basin, but also the dam site necessary to the development.

But $555,531 was paid not for one-fifth of the land required; it was paid for 10,440 acres plus an operating talc mine, or 43 per cent of the total land, all acquired for the project and all equally necessary. The court below erroneously assumed that only the land below the contour line was necessary for reservoir purposes. In acquiring land for a reservoir, it is necessary to purchase more land above the contour line than below for reservoir protection and to avoid excessive severance damages and road-relocation problems (R. 900–901, 906–908). This is borne out by Powelson's purchasing experience (R. 258–259, 900–901; Res. Ex. 8). Every acre is required for the reservoir—the part above no less than the part below the contour line. The price does not depend on the location above or below the contour line but rather on the general character of the land (R. 902). Yet the court by some process of magic assigned $200 an acre as the value of the land below the contour line, while treating the land above that line as hav-

ing a value of $10 an acre, its true value (R. 1058, 1077–1081). But neither the prices paid by the Government nor anything else in the record justifies the assumption that the land below the contour line was worth $200 an acre to the Government or to anyone else.

Moreover, the price paid for land by one vested with the power of eminent domain is not a measure of the market value of the property since the purchase can never constitute a voluntary transaction. The condemnor is faced with the necessity of acquiring the property, and the owner is forced to sell either at a price fixed by negotiations or at a price fixed by the court in condemnation proceedings. The price paid by the condemnor is therefore in the nature of a compromise and is based on the evaluation by the parties of the risks of litigation. These considerations undoubtedly were taken into account by the Tennessee Valley Authority in arriving at its own estimates of "value" for the purpose of making negotiated purchases. For this reason, and for the further reason that it opens the door to a multitude of collateral issues, this type of evidence has been consistently excluded. *United States* v. *Bailey*, 115 F. (2d) 433 (C. C. A. 5th); *United States* v. *Freeman*, 113 Fed. 370 (D. Wash.); *United States* v. *Beaty*, 198 Fed. 284 (W. D. Va.); 2 Nichols, *Eminent Domain* (2d ed., 1917) sec. 456; 2 Lewis, *Eminent Domain* (3d ed., 1909) sec. 667.

## IV.

### THE MAXIMUM MARKET VALUE OF THE LAND AT THE DATE OF TAKING WAS $165,000

The burden of proving the value of the land in suit rested upon respondent.[47] Instead of discharging that burden by introducing evidence of market value for power purposes or for any other purposes, respondent chose to rely solely upon his own estimates and those of the witness Bevan, which estimates admittedly were arrived at by capitalizing the predicted profits from the nonexistent four-dam development and allocating a share of the capitalized value to the lands condemned. As has already been pointed out, these estimates must be disregarded both because respondent is not entitled to power value and because even if he were so entitled, such estimates do not constitute proof of power value.

The court below has determined that the land condemned, exclusive of reservoir value was worth $10 an acre. At that rate, the fair market value of the property was under $130,000. If our contention as to the impropriety of including any element of value for power purposes is correct, the judgment of the court below should be reversed

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[47] *Welch* v. *Tennessee Valley Authority*, 108 F. (2d) 95 (C. C. A. 6th), certiorari denied, 309 U. S. 688; *Ralph* v. *Hazen*, 93 F. (2d) 68 (App. D. C.); *United States* v. *Crary*, 2 F. Supp. 870 (W. D. Va.); 2 Lewis, *Eminent Domain* (3d ed., 1909) sec. 645; 2 Nichols, *Eminent Domain* (2d ed., 1917) sec. 432.

with directions to enter an award based upon the value of $10 an acre which the court has already found.

The only competent and relevant testimony of any substance in the record as to actual market value is that of a number of local witnesses offered by the Government who were familiar with respondent's property and with the prices at which land in the vicinity had been bought and sold. These witnesses valued 11,000 acres of respondent's land at from $95,000 to $141,000, or at a price of from $9 to $13 per acre (R. 523, 534; Comm. Tr. 3093, 3204, 3215, 3225, 3248). Assuming that respondent owned the maximum of 12,679.94 acres which he claimed, and applying the maximum per-acre price of $13, the value of the land in suit would be approximately $165,000.

The testimony of these witnesses is uncontroverted. Respondent has contended that their valuations must be ignored because they reflect only agricultural value and do not take into consideration the adaptability of the property for power purposes. Even assuming that respondent is entitled to power value, his contention is not accurate. While it is true that these witnesses did not value the land as if it were part of a completed power development, two of them stated that it was common knowledge in the vicinity that the land had once been purchased with a view to its future power development and that their valuations reflected any enhancement in value which might have

resulted from that circumstance (R. 528–532). Under the accepted test of market value, respondent, even if in a position to claim power value, was entitled to no more."

There are only two other items of evidence in the record which might properly be considered in arriving at an award. One is the fact that during a period of high and speculative prices respondent paid for this same land a total of approximately $277,000 (Res. Ex. 363). The other is Powelson's own testimony, during the course of his litigation with the Hiawassee River Power Company in 1925, that the market value of a portion of this same land, including its value for power purposes, ranged from $5 to $20 per acre (R. 378). However, these items of evidence are not inconsistent with a value of $10 per acre, exclusive of power value, or with a total maximum valuation of $165,000 (at $13 an acre) which took into account any enhancement due to a possible speculative value for power purposes.

## V

### THE AWARD OF SEVERANCE DAMAGES WAS ERRONEOUS

1. The court below concluded that respondent was entitled to severance damages allegedly caused to some 8,000 acres of land not taken, resulting

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" *Olson* v. *United States*, 292 U. S. 246; *San Diego Land & Town Co.* v. *Neale*, 88 Calif. 50, 25 Pac. 977 (1891); *Central Georgia Power Co.* v. *Stone*, 139 Ga. 416, 77 S. E. 565 (1913).

from destruction of "the possibility of the integrated four dam development contemplated by respondent" (R. 1080). The award was rested not upon a severance of contiguous tracts used together as a unit at the time of the taking but upon the conception that all of respondent's scattered and noncontiguous holdings in this area should be considered as unitary because respondent planned at an unpredicted time in the future to use them as parts of an integrated hydroelectric power system. It is thus clear that the award of severance damages rests ultimately upon the same view of respondent's case as the award which valued the condemned property on the basis of its supposed worth in a unified power project. If, as we contend, that valuation of the lands taken is erroneous, the award of severance damages loses all support and this element of compensation is eliminated from the case.

2. In addition, there are other and independent considerations which require that the award of severance damages be set aside. The "severance" in this case was of scattered noncontiguous holdings, the great majority of which were located miles both from the land taken and from each other, and some of which were owned by a subsidiary corporation;[*] and the damage consisted

[*] The lands owned by respondent in the hypothetical Powelson and Murphy reservoirs are noncontiguous, being separated from each other by intervening fee ownerships.

not in a *present* injury to respondent's remaining property caused by the taking but in an alleged impairment of its value for a prospective use (in conjunction with the land condemned and land not owned by respondent) to which respondent at some date might have put it.

Where the condemnor takes only part of an entire undivided tract, the owner is, of course, entitled to compensation for any resulting diminution in value of the remaining portion, as well as for the value of the part taken. Such would be the situation where the taking of the cultivated portion of a farm has depreciated the value of the remainder, or, as in *United States* v. *Grizzard*, 219 U. S. 180, where the taking of part of a tract has rendered it impossible to secure access to the remainder.

But in the absence of physical contiguity, severance damages are allowable only where properties have already been developed for use together and

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It is approximately three miles from the so-called Murphy dam site to the nearest land owned by respondent in the Powelson reservoir. Crossing the intervening space are United States Highway No. 64, North Carolina State Highway No. 19, and the Louisville & Nashville and Southern railroads. The town of Murphy, Cherokee County, and the Cherokee County Board of Education all own property in the area (R. 278; Comm. Tr. 3039–3040; Pet. Ex. 2–V).

The hypothetical Nottely reservoir, located entirely in the State of Georgia, is noncontiguous to other properties claimed by respondent. From the so-called Nottely dam site it is 13 miles to the Powelson dam site (Res. Ex. 8) and 6 miles to the nearest land owned by respondent in the Powelson reservoir (R. 276–278; Comm. Tr. 1171, 1653).

*actually* are so used at the time one tract is condemned. Thus, in *Essex Storage Elec. Co.* v. *Victory Lumber Co.*, 93 Vt. 437, 108 Atl. 426 (1919), a public utility condemned the site of an existing lumber mill which was owned and used by the condemnee in connection with a timber tract separated from the mill site by intervening fee ownerships. Since the taking increased the difficulty and cost of marketing the timber when felled, the court sanctioned an award of severance damages.

Other cases, however, have denied claims for severance damages to landowners analogously situated. In *Cameron* v. *Chicago, M. & St. P. Ry. Co.*, 42 Minn. 75, 43 N. W. 785 (1889), the condemnee owned a farm which was divided by a railroad right of way. Upon the partial taking of one part of the farm, the owner claimed severance damage to all that remained, on the ground that the entire farm had been used and operated as a unit. The claim was denied. In *Oakland* v. *Pacific Coast Lumber & Mill Co.*, 171 Cal. 392, 153 Pac. 705 (1915), a city condemned lands located on the waterfront which had been used as dock facilities for an established mill business located about 400 feet from the land taken. The claim for severance damages, founded upon the theory of unity of use of the two tracts, was similarly denied. The holding that physical contiguity is essential was followed by another California court in *East Bay Municipal Utility Dist.* v. *Kieffer*, 99 Cal. App. 240, 278 Pac. 476 (1929),

rehearing denied, 99 Cal. App. 260, 279 Pac. 178 (1929).

In these cases it has been pointed out that the claim for severance damages is, in fact, merely another way of seeking damages for loss of business or prospective business (*Oakland* v. *Pacific Coast Lumber & Mill Co., supra,* at 399, 153 Pac. at 707), and the federal courts have consistently held that just compensation does not include any award for damage to the business of the landowner which results from the taking of his land (*E. g., Mitchell* v. *United States,* 267 U. S. 341).

While there is some divergence of view on the allowability of severance damages for the taking of one tract where condemnation diminishes the value of other land currently joined in an *existing* use with the tract condemned, the decisions are unanimous in holding that severance damage to a noncontinguous tract may not be considered in arriving at an award where unity of use between the land taken and the land remaining is only prospective. A typical case based on a claim for such prospective use is *White* v. *Metropolitan West Side El. R. Co.,* 154 Ill. 620, 39 N. E. 270 (1894). There the condemnee owned an entire block separated from the condemned property only by a city street. He contended that he had acquired both tracts for the purpose of using them together as the site for a school or university; such use would require the construction of extensive improvements on both lots. The court refused to admit any evi-

dence as to damage to the property not taken. The opinion stated:

> Whatever may have been the intention or purpose in purchasing the two tracts of land can make no difference. The two tracts of land must be considered as they existed when the proceeding was instituted. At that time they were separated by a public street. [154 Ill. at 626.]

In *St. Louis, M. & S. R. R. Co.* v. *Aubuchon*, 199 Mo. 352, 97 S. W. 867 (1906), the owner of riparian land urged that he had bought the property to be used in the future as a sheltered winter feed lot for cattle ordinarily kept on an island owned by the condemnee and located in the river opposite to the property taken. He claimed that the taking of the mainland tract seriously impaired the usefulness of the island, and sought severance damages. In holding that the state lower court committed error in permitting this claim to be considered, the Missouri Supreme Court said of the landowner's prospective use of the properties together:

> Defendant may dream it will be so, he may hope it will come to pass, but neither his hopes nor his dreams may be assessed at a pecuniary value by a jury. [199 Mo. at 375.]

The decisions hitherto relied upon by respondent in the present case and cited by the Circuit Court of Appeals lend no support to the asserted claim for severance damages here. As pointed out, the

*Grizzard* case, *supra*, involved lands which were physically contiguous. In *Campbell* v. *United States*, 266 U. S. 368, a part of the owner's land, consisting of his house and a small garden, was taken for a nitrate plant. This part was separated from the remainder, the owner's farm, only by a public road. No question was raised as to his right to recover damages to this remainder resulting from the taking of his home site. The sole issue discussed in the opinion was whether he could also recover damages resulting from the use to be made of other adjoining property belonging to other owners. It was held that he could not.

We agree with the court below that the rule to be applied is set forth by Judge Gray, speaking for the Circuit Court of Appeals for the Third Circuit in *Sharpe* v. *United States*, 112 Fed. 893 (C. C. A. 3d), affirmed, 191 U. S. 341:

> It is not denied that in rendering the "just compensation" secured by the constitution of the United States to the citizen whose property is taken for public uses it is right and proper to include the damages in the shape of deterioration in value which will result to *the residue of the tract* from the occupation of the part so taken. In applying this rule, however, regard is had to the integrity of the tract as a unitary holding by the owner. *The holding from which a part is taken for public uses must be of such a character as that its integrity as an individual tract shall have been destroyed by the taking.* Depreci-

ation in the value of the residue of such a tract may properly be considered as allowable damages in adjusting the compensation to be given to the owner for the land taken. It is often difficult, when part of a tract is taken, to determine what is a distinct and independent tract; but the character of the holding, and *the distinction between a residue of a tract whose integrity is destroyed by the taking and what are merely other parcels or holdings of the same owner, must be kept in mind* in the practical application of the requirement to render just compensation for property taken for public uses. How it is applied must largely depend upon the facts of the particular case and the sound discretion of the court. [112 Fed. at 896; italics supplied.]

In the *Sharpe* case, the landowner claimed that the taking of a portion of his land for use as a Government reservation would result in injury to the remainder. The owner held the legal title to three separate tracts, physically adjoining each other except for the intervention of a public road but ownership of which was derived from separate chains of title. Only one of these tracts was involved in the condemnation. It was held that no severance damages could be allowed.[50]

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[50] Nor does *Trustees of Boston University* v. *Commonwealth*, 286 Mass. 57, 190 N. E. 29 (1934) support respondent's theory of severance damages. The University owned tracts of land, separated from each other only by a public street, which it held for use together as part of the University

3. Moreover, of the 8,000 acres upon which severance damages are claimed, 4,300 acres are situated in the State of Georgia in the proposed Nottely reservoir (Res. Ex. 362); this land is not owned by the Southern States Power Company or by respondent (R. 34, 278; Comm. Tr. 100–102; 211–219) but by the Union Power Company, a Georgia corporation, which is a wholly separate and distinct company.[n] Respondent urges that the Union Power Company is a wholly owned subsidiary of the Southern States Power Company; and the court below stated (R. 1084) that any diminution in the value of the

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grounds. The land not taken was already developed and occupied by buildings. The Trustees claimed severance damage to this portion as a result of condemnation of the remaining property. The court there allowed the claim; the opinion stated that under Massachusetts law title to the street was in the Trustees, subject only to the public easement, which makes clear that the two tracts were in law physically contiguous. See *Cameron* v. *Chicago, M. & St. P. Ry.*, 42 Minn. 75, 77, 43 N. W. 785, 786–787 (1889). Further, the property remaining to the landowner and damaged by the severance was already at the time of condemnation developed and in use as a university.

[n] The Circuit Court of Appeals, in an attempt to meet this obvious bar to making an award for severance damage to land of the Union Power Company, authorized the latter to become a party to the suit and be bound by the judgment awarding damages to respondent. This expedient fails to alter the fact that none of the Union Power Company's land has been taken, and that it still owns the land allegedly damaged by severance. Thus respondent is awarded severance damages for separation of the land condemned from property that he never owned.

subsidiary's land would be reflected directly in the value of the parent's holding of stock. But the theory of severance damages is compensation for depreciation of *land*, on account of the taking of other land. See *Sharpe* v. *United States*, *supra*, at 896. And the cases are clear that severance damages will not be allowed where the land to which damage is claimed is owned by a person other than the owner of the land condemned. This rule has been applied even where title to one tract is in a husband or wife while title to the remainder is in both, and where partnership property is involved.[22] The same result was reached where the owner of the property taken had an option to buy contiguous property claimed to have been severed.[23] In the present case the award to respondent for severance damage to the Nottely property could only be warranted by disregarding the separate entity of

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[22] See *Glendenning* v. *Stahley*, 173 Ind. 674, 91 N. E. 234 (1910), where one spouse owned the condemned tract in fee and claimed damages for a contiguous tract which was used as a part of the same farm, the title to which was held by both spouses as tenants by entirety. See also *Tillman* v. *Lewisburg & N. R. Co.*, 133 Tenn. 554, 182 S. W. 597 (1916) (converse); *Duggan* v. *State*, 214 Ia. 230, 242 N. W. 98 (1932) (ownership of one section in X. of other in X and her brother); *Potts* v. *Pennsylvania & S. V. R. Co.*, 119 Pa. St. 278, 13 Atl. 291 (1888) (one tract belonging to A, the other to A and B, partners, as tenants in common).

[23] *East Bay Municipal Utility Dist.* v. *Kieffer*, 99 Cal. App. 240, 278 Pac. 476 (1929), rehearing denied, 99 Cal. App. 260, 279, Pac. 178 (1929).

Union Power Company as distinct from Southern States Power Company, respondent's assignor. However, respondent, for reasons of his own, has chosen to preserve the separation of corporate identity and by so doing has doubtless obtained the advantages which separate incorporation affords for promotional as well as other purposes. Having secured those advantages, respondent may not at the same time avoid the burdens which likewise fall upon such arrangements. Cf. *Planters' Cotton Oil Co., Inc.*, v. *Hopkins*, 53 F. (2d) 825 (C. C. A. 5th), aff'd 286 U. S. 332; *Santa Fe Elec. Co., Inc.*, v. *General Elec. Co.*, 52 F. (2d) 603 (C. C. A. 3d); *Eichelberger* v. *Arlington Building, Inc.*, 280 Fed. 997 (App. D. C.); *Higgins* v. *Smith*, 308 U. S. 473, 477.

## VI

### THE AWARD OF INTEREST WAS EXCESSIVE

The same erroneous conception of respondent's lands in the Hiwassee River area as the location of a potential multi-dam utility system, which underlies the opinion of the court below in making its award of compensation, is apparent in its holding concerning the basis on which interest due respondent should be computed.

The property of respondent involved in this litigation was not all taken at the same time. The Government filed five separate declarations of taking; it accompanied each with a deposit of the esti-

mated value of the land contemporaneously taken.[84] The District Court did not award interest from the date of the filing of each separate declaration of taking on the value of the particular property covered by such declaration. Instead, it found that the proposed integrated four-dam development was precluded by the Government's filing of its first declaration of taking, on January 28, 1936, that thereafter the remaining land of the respondent was worth only $10 an acre. Accordingly, the Court held that interest *from the date of the first taking* should be paid on the total awarded value

[84] The acreage taken at the filing of each declaration and the corresponding deposits of money were as follows:

| Date | Acres Taken | Money Deposited |
|---|---|---|
| January 28, 1936 | 872.6 | $4,001.94 |
| October 24, 1936 | 1,380.6 | 8,756.92 |
| October 12, 1938 | 605.9 | 6,226.27 |
| November 21, 1938 | 8,829.54 | 73,969.14 |
| September 1939 | 36.7 | |
| | 11,733.44 | $93,955.27 |

The acreages given in this tabulation are taken from petitioner's exhibit 2–W. These figures differ from the total acreage of 12,679.94 claimed by respondent (Res. Ex. 362) and adopted by the court below (R. 1053). The total number of acres, 11,733.44, does not include approximately 1,000 acres lying in the bed of the Hiwassee River which were taken by the various declarations as appurtenant to the adjoining riparian lands.

The 36.7 acres last taken constituted the site of the Murphy electric power plant. The total of $93,065.27 deposited does not include any sum for this plant.

of the land valued as reservoir land which had been taken by *all* the declarations, less the value of the land not taken by the first taking (valued as $10-per-acre mountain land) and less the amount deposited with the first taking.[55] It also awarded interest from the date of each of the subsequent takings upon the land covered by each of them (valued as $10-per-acre mountain land), less the sum deposited with each. This method of computing interest was approved by the Circuit Court of Appeals.

Computation of interest on this basis could be justified only on the theory that respondent is entitled to compensation for his land which includes value for power purposes. If he is not so entitled, there can be no reason for a departure from the provisions of the general federal eminent domain statute,[56] to

[55] The courts below took the same view of respondent's case with respect to the question of severance damages which they held concerning the principal award of compensation. As a result the District Court awarded, and the Circuit Court of Appeals approved, severance damages for assumed injury to respondent's land not taken. They then allowed interest on these damages as if the injury supporting them had occurred at the time of the first taking. Since severance damages ought not to have been awarded at all, there is no need to consider the proper computation of interest on such an item in this case.

[56] Act of February 26, 1931, c. 307, 46 Stat. 1421 (40 U. S. C., Sec. 258a). The procedure authorized by that statute is carried over for the use of the Tennessee Valley Authority by section 4 (h) and (i) of the Tennessee Valley Authority Act, Act of May 18, 1933, c. 32, 48 Stat. 58, 60–61 (16 U. S. C., sec. 831c (h), (i)), as amended, pursuant to which the proceedings in the present case were instituted.

the effect that a judgment shall include interest at 6 per cent upon the difference between the amount deposited in court and the sum finally awarded for the land covered by each declaration of taking from the date of its filing to the date of payment of the award.[57]

## VII

### THE UNUSUAL SCOPE OF APPELLATE REVIEW UNDER SECTION 25 OF THE TENNESSEE VALLEY AUTHORITY ACT

The statute pursuant to which the present proceeding was brought provides that after decision by the district judges on exceptions to the commissioners' award either party may appeal to the circuit court of appeals; that court "shall upon the hearing on said appeal dispose of the same upon the record, without regard to the awards or findings theretofore made by the commissioners or the district judges, and such circuit court of appeals shall thereupon fix the value of said property sought to be condemned."[58] The character of the review provided by this statute differs radically from the scope of appellate action in other cases involving disputed

[57] The statute (46 Stat. 1421), after providing for the taking of land by declaration of taking, provides in section 1 (5) that "the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court."

[58] Section 25 of the Act of May 18, 1933, 48 Stat. 58, 70 (16 U. S. C., sec. 831x).

issues of fact. *E. g., Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177 (finding of administrative body); *Shoemaker* v. *United States*, 147 U. S. 282 (award of commissioners in eminent domain); cf. Rule 52 (a), Rules of Civil Procedure (effect of findings by district court). It is not, then, the function of the appellate court to inquire only whether the findings below are supported by substantial evidence or are not clearly erroneous; rather, the statute contemplates an independent revaluation by the appellate court of the property condemned, free from any influence of the findings and award of the commissioners or the district court.

While the opinion of the Circuit Court of Appeals in this case contains conflicting statements concerning the court's interpretation of the statute with regard to review (R. 1073–1074), it is clear from the disposition of the case made on appeal that the court conceived its function to be narrower than that directed by the plain language of section 25; the Circuit Court of Appeals adopted the award of the District Court in all material respects,[39] describing its action as an *affirmance* of the judgment below (R. 1084).

There is no problem raised by the statute, as the court below suggested (R. 1073), of a trial *de novo* with fresh taking of evidence. The Circuit Court of Appeals for the Fifth Circuit has experienced

[39] See footnote 10, *supra*, p. 14.

no difficulty in applying section 25 literally. *United States* v. *Reynolds*, 115 F. (2d) 294 (C. C. A. 5th); *United States* v. *Bailey*, 115 F. (2nd) 433 (C. C. A. 5th); *Stephenson Brick Co.* v. *United States*, 110 F. (2d) 360 (C. C. A. 5th); *United States* v. *Harris*, 115 F. (2d) 343 (C. C. A. 5th); *Finley* v. *United States*, 118 F. (2d) 815 (C. C. A. 5th). In three of these cases that court has made substantial reductions in district court awards.

## CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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FEBRUARY, 1942

## APPENDIX

Tennesse Valley Authority Act of 1933, c. 32, 48 Stat. 58:

SEC. 25. The Corporation may cause proceedings to be instituted for the acquisition by condemnation of any lands, easements, or rights of way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act. The proceedings shall be instituted in the United States district court for the district in which the land, easement, right of way, or other interest, or any part thereof, is located, and such court shall have full jurisdiction to divest the complete title to the property sought to be acquired out of all persons or claimants and vest the same in the United States in fee simple, and to enter a decree quieting the title thereto in the United States of America.

Upon the filing of a petition for condemnation and for the purpose of ascertaining the value of the property to be acquired, and assessing the compensation to be paid, the court shall appoint three commissioners who shall be disinterested persons and who shall take and subscribe an oath that they do not own any lands, or interest or easement in any lands, which it may be desirable for the United States to acquire in the furtherance of said project, and such commissioners shall not be selected from the locality wherein the land sought to be condemned lies. Such commissioners shall receive a per diem of not to exceed

$15 for their services, together with an additional amount of $5 per day for subsistence for time actually spent in performing their duties as commissioners.

It shall be the duty of such commissioners to examine into the value of the lands sought to be condemned, to conduct hearings and receive evidence, and generally to take such appropriate steps as may be proper for the determination of the value of the said lands sought to be condemned, and for such purpose the commissioners are authorized to administer oaths and subpoena witnesses, which said witnesses shall receive the same fees as are provided for witnesses in the Federal courts. The said commissioners shall thereupon file a report setting forth their conclusions as to the value of the said property sought to be condemned, making a separate award and valuation in the premises with respect to each separate parcel involved. Upon the filing of such award in court the clerk of said court shall give notice of the filing of such award to the parties to said proceeding, in manner and form as directed by the judge of said court.

Either or both parties may file exceptions to the award of said commissioners within twenty days from the date of the filing of said award in court. Exceptions filed to such award shall be heard before three Federal district judges unless the parties, in writing, in person, or by their attorneys, stipulate that the exceptions may be heard before a lesser number of judges. On such hearing such judges shall pass de novo upon the proceedings had before the commissioners, may view the property, and may take additional evidence. Upon such hearings

the said judges shall file their own award, fixing therein the value of the property sought to be condemned, regardless of the award previously made by the said commissioners.

At any time within thirty days from the filing of the decision of the district judges upon the hearing on exceptions to the award made by the commissioners, either party may appeal from such decision of the said judges to the circuit court of appeals, *and the said circuit court of appeals shall upon the hearing on said appeal dispose of the same upon the record, without regard to the awards or findings theretofore made by the commissioners or the district judges, and such circuit court of appeals shall thereupon fix the value of the said property sought to be condemned.*

Upon acceptance of an award by the owner of any property herein provided to be appropriated, and the payment of the money awarded or upon the failure of either party to file exceptions to the award of the commissioners within the time specified, or upon the award of the commissioners, and the payment of the money by the United States pursuant thereto, or the payment of the money awarded into the registry of the court by the Corporation, the title to said property and the right to the possession thereof shall pass to the United States, and the United States shall be entitled to a writ in the same proceeding to dispossess the former owner of said property, and all lessees, agents, and attorneys of such former owner, and to put the United States, by its corporate creature and agent, the Corporation, into possession of said property. (Italics supplied.)

* * * * *

SEC. 26a. [As amended by the Act of August 31, 1935, c. 836, 49 Stat. 1075, 1079.] The unified development and regulation of the Tennessee River system requires that no dam, appurtenant works, or other obstruction, affecting navigation, flood control, or public lands or reservations shall be constructed, and thereafter operated or maintained across, along, or in the said river or any of its tributaries until plans for such construction, operation, and maintenance shall have been submitted to and approved by the Board; and the construction, commencement of construction, operation, or maintenance of such structures without such approval is hereby prohibited. When such plans shall have been approved, deviation therefrom either before or after completion of such structures is prohibited unless the modification of such plans has previously been submitted to and approved by the Board.

* * * * *

Federal Water Power Act, c. 285, 41 Stat. 1063, as amended by the Act of August 26, 1935, c. 687, 49 Stat. 803, 838, 842, 846:

SEC. 7. * * *

(b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such

recommendations as it may find appropriate concerning such development.

SEC. 23. * * *

(b) * * * Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

Rivers and Harbors Act of 1899, c. 425, 30 Stat. 1121:

SEC. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the con-

sent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

SEC. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter

or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

U. S. GOVERNMENT PRINTING OFFICE: 1945